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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 229

ROBERT P. PATTERSON, SECRETARY OF WAR, AND EDWARD F. WITSELL, THE ADJUTANT GENERAL, UNITED STATES ARMY, PETITIONERS

vs.

JAMES JOHN LAMB

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

PETITION FOR CERTIORARI FILED JUNE 22, 1946
CERTIORARI GRANTED OCTOBER 14, 1946

IN THE

United States Court of Appeals

DISTRICT OF COLUMBIA

No. 9041

JAMES JOHN LAMB, *Appellant*

v.

ROBERT P. PATTERSON, et al., *Appellees*

Appeal from the District Court of the United States for the District of Columbia.

JOINT APPENDIX

Filed Oct 28 1944

In the District Court of the United States
For the District of Columbia

Civil Action No. 24628

JAMES JOHN LAMB, 717 Davenport Bank Building, Davenport, Iowa, *Plaintiff*,

v.

HENRY L. STIMSON, Secretary of War of the United States, Washington, D. C., and J. A. ULIO, The Adjutant General of the United States Army, Washington, D. C., *Defendants*.

Amended Complaint for Declaratory Judgment and for Supplemental Relief

Plaintiff, James John Lamb, for amended cause of action against defendants, respectfully asserts:

1. That he is a citizen of the United States and a resident of the City of Davenport in the State of Iowa and that he has been such a citizen and such a resident continuously for more than fifty years; that his name sometimes is written James J. Lamb and also sometimes is written James Lamb.

2. That defendant, Henry L. Stimson, is the Secretary of War of the United States and defendant, J. A. Ulio, is the Adjutant General of the United States Army, with their residences and official places of business in the City of Washington in the District of Columbia; that in their official capacities they have control and supervision over the granting of and the authority to grant discharges, to inducted and enlisted men, from the Military Service of the United States, including the Army of the United States.

3. That pursuant to the provisions of the Act of Congress of May 18, 1917, which act is known as the Selective Draft Act of 1917 and also is called the Selective Service Law of

1917, and the public resolutions and acts amendatory thereof and Selective Service Regulations prescribed by the President of the United States, plaintiff registered at Davenport, Iowa and was under the jurisdiction of Local Board for Division No. 1, City of Davenport, Iowa; that his numbers in the draft were—Order No. 260 and Serial No. 1.

4. That the said Local Board for Division No. 1, City of Davenport, Iowa, at all times herein mentioned was acting for the War Department of the United States and its acts were under authority of the then Secretary of War of the United States.

5. That in the year 1918, after being physically examined by order of said Local Board for Division No. 1, City of Davenport, Iowa, plaintiff was by said Local Board, in writing, notified that as a result of said physical examination he had been found qualified for Military Service and was subject to call when the Government had need for his services.

6. That in writing, on November 9, 1918, by said Local Board for Division No. 1, City of Davenport, Iowa, plaintiff was ordered to report to said Local Board at Davenport, Iowa on November 11, 1918 at nine o'clock A.M. for immediate military duty; that a copy of said order is attached hereto, is marked Exhibit "A" and hereby is made part hereof.

3 7. That plaintiff obeyed said Exhibit "A" order and on November 11, 1918 at 9 o'clock A.M., at Davenport, Iowa, he reported in person to said Local Board for Division No. 1 of the City of Davenport, Iowa and by said Local Board on November 11, 1918, at Davenport, Iowa, he was accepted for general military service and by said Local Board, on the morning of November 11, 1918, at Davenport, Iowa, he was lawfully inducted into the Army of the United States.

8. That thereafter, on the morning of November 11, 1918, at Davenport, Iowa, there was delivered to plaintiff by

said Local Board, for Division No. 1, City of Davenport, Iowa, a written warrant of appointment as leader of the contingent of drafted men of which he was a member and he was notified orally by said Local Board that he was a soldier in the Army of the United States and that said warrant of appointment as leader vested him with power and authority to maintain good order among the men in the contingent and he was also notified orally by said Local Board that he was charged with the duty and responsibility of maintaining proper discipline in the contingent of men so as to not bring reproach to himself or to the men in the contingent in his charge, or to the Military Service of the United States; that a copy of said written warrant of appointment as leader is attached hereto, marked Exhibit "B" and hereby is made part hereof.

9. That thereafter, on the morning of November 11, 1918, at Davenport, Iowa, by said Local Board, for Division No. 1, City of Davenport, Iowa, plaintiff orally was ordered to assemble the contingent of drafted men in his charge and proceed with said men to Camp Dodge, Iowa for attachment to such branch or division of the Military Service of the United States as might be required and found necessary by the War Department; that in obedience to said order he did assemble the contingent of drafted men on the morning of November 11, 1918, at Davenport, Iowa and proceed with the men in the contingent from the headquarters of said Local Board to entrain for Camp Dodge, Iowa.

10. That thereafter, at Davenport, Iowa, on November 11, 1918, before actually entraining for Camp Dodge, Iowa, plaintiff was notified orally by said Local Board, for Division No. 1, City of Davenport, Iowa, that he would not entrain on November 11, 1918 for Camp Dodge, Iowa because of cancellation of draft calls and induction orders and also was informed orally by said Local Board that he still was a soldier in the Army of the United States, subject to military orders and to laws and regulations governing the said

Army of the United States, and by said Local Board, for Division No. 1, City of Davenport, Iowa, was ordered orally to hold himself in readiness at all times to obey further orders and also was informed orally by said Local Board that he would receive by mail, in a few days, from said Local Board, a written notification; that as ordered by said Local Board he did hold himself in readiness at all times from November 11, 1918 to November 14, 1918, both dates inclusive, to obey any orders given him by proper Military authorities of the United States.

11. That on November 15, 1918, in writing, by mail from said Local Board, for Division No. 1, City of Davenport, Iowa, plaintiff received notice that by order of the Provost Marshal General acting under the instructions of the President all orders of induction into the Army had been cancelled and that all registrants who were inducted into the Army, but not entrained, were discharged from the Army and that the cancellation of such induction orders, in cases of registrants who were inducted, had the effect of an honorable discharge from the Army; that a copy of said written notice is attached hereto, is marked Exhibit "C" and hereby is made part hereof.

12. That, as one inducted into the Army but not entrained, plaintiff was discharged from the Army of the United States, at Davenport, Iowa, by order of the President, through the Provost Marshal General, dated November 11, 1918, which order was set out in and transmitted by Telegram Number B 4292; that said order of the President did not discharge plaintiff from the draft; that a copy of said order of the President is attached hereto, is marked Exhibit "D" and hereby is made part hereof.

13. That thereafter there was issued to plaintiff at Camp Dodge, Iowa, by an officer of the Military Service of the United States acting under and by authority of the then Secretary of War, and mailed to plaintiff from Camp Dodge, Iowa, and received by him on or about January 26, 1919, at Davenport, Iowa, a Certificate of Discharge from Draft,

Form 638-1 A.G.O., dated November 14, 1918; that a copy of said Discharge from Draft certificate is attached hereto, is marked Exhibit "E" and hereby is made part hereof.

14. That accompanying said Exhibit "E" certificate in the mail was a War Quartermaster's check drawn on the Treasurer of the United States for the amount of $4.00, payable to the order of plaintiff, which was the pay of plaintiff for his servics with the Army of the United States for the period from November 11, 1918 to November 14, 1918, both dates inclusive, at the rate of pay then prevailing for non-commissioned enlisted men in the Military Service of the United States and was his Final Pay; that a copy of said check is attached hereto, is marked Exhibit "F" and hereby is made part hereof.

15. That plaintiff served as a soldier in the Army of the United States from November 11, 1918 to November 14, 1918, both dates inclusive, and that his said service was honest and faithful and his conduct was such as to warrant his reenlistment; that he never was rejected for or from Military Service because of physical unfitness or physical disability; that he was physically and in every respect qualified for Military Service; that he was discharged from the Army solely because of the signing of the Armistice between the United States and Germany; that he could not lawfully be separated from the Army without receiving a proper notice of discharge and that the written notice he received, which is Exhibit "C," stated that the cancellation of his induction order, after he was inducted into the Army and before he entrained for Camp Dodge, Iowa, had the effect of an honorable discharge from the Army; that under the actual facts and under Army regulations in force and effect on November 11, 1918, the Discharge from Draft on Form 638-1 A.G.O. issued to him was not and is not the proper certificate of Discharge from the Army of the United States to which he was and is lawfully entitled.

16. That in good faith, as a person inducted into the Army but not entrained, plaintiff at all times since Novem-

ber 15, 1918 has relied on and still relies on the statement in Exhibit "C" that the cancellation of his induction order after his induction "has the effect of an honorable
7 discharge from the army"; that in good faith at all times since November 11, 1918 he has relied on and still relies on the statement in Exhibit "D" that he is "discharged from the Army"; that in good faith since November 11, 1918 he has represented himself as an honorably discharged soldier of the Army of the United States; that as an honorably discharged soldier of the War with Germany, commonly called World War I, and as a resident of Scott County in the State of Iowa, he annually, under oath, applied to the public taxing authorities of Scott County, Iowa for a tax exemption and until the year 1940 was allowed by such public authorities an exemption from taxation under a law in force and effect in the State of Iowa, which law granted such tax exemption on "the property not to exceed Five Hundred Dollars in actual value of any honorably discharged soldier, sailor, marine or nurse of the War with Germany"; that on August 26, 1941, as an honorably discharged soldier of the War with Germany, he filed, in writing, in the office of the Auditor of Scott County in the State of Iowa his verified claim for such tax exemption for the year 1941; that on or about October 1, 1941 the said claim for tax exemption was denied by the Board of Supervisors of Scott County, Iowa; that the members of the said Board of Supervisors in the year 1941 claimed that he was not a soldier and that he was not honorably discharged from the Army but was a person only discharged from the draft; that such assertions were urged by the said Board of Supervisors for the first time in the year 1941; that the first knowledge he had of there being any question as to his being an honorably discharged soldier of the Army of the United States came to him in the year 1941 as hereinbefore stated.

8 17. That on October 23, 1941 in the Scott County Iowa District Court, at Davenport, Iowa, as plaintiff,

he brought an action against the members of the Board of Supervisors of Scott County, Iowa as defendants, alleging that he was an honorably discharged soldier of the War with Germany and also alleging that in denying his claim for tax exemption the said defendants, as members of the Scott County Iowa Board of Supervisors, acted illegally and unlawfully and that he had no adequate remedy at law; that in said suit he asked the Scott County Iowa District Court to decree that he was an honorably discharged soldier of the War with Germany and that he was entitled to said tax exemption; that the defendants as members of the Board of Supervisors of Scott County Iowa filed answer in said suit denying all of the allegations of plaintiff's petition; that the said suit was heard, argued and taken under advisement by the Scott County Iowa District Court; that on May 4, 1942 the Scott County Iowa District Court filed its "Order and Decree" in which it ordered, adjudged and decreed that "plaintiff James J. Lamb is an honorably discharged soldier of the War with Germany which war frequently is called World War I."

18. That within the time allowed by the laws of the State of Iowa the said defendants, as members of the Board of Supervisors of Scott County Iowa appealed from the said order and decree of the Scott County Iowa District Court to the Supreme Court of the State of Iowa; that the Supreme Court of the State of Iowa on March 9, 1943 delivered and filed in said case a majority opinion and a dissenting opinion; that the said majority opinion of

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the Iowa Supreme Court reversed the order and decree of the District Court of the State of Iowa in and for Scott County dated May 4, 1942; that the opinions of the Iowa Supreme Court in said case of *Lamb* vs. *Kroeger* are reported in 8 N.W. (2nd) commencing on page 405; that in its said majority opinion the Iowa Supreme Court in reversing the District Court, stated—"we feel there is a serious doubt upon the question whether the appellee is an honorably discharged soldier of the War with Germany

within the meaning of Section 6946 Code of Iowa 1939"; that plaintiff applied to the Supreme Court of the State of Iowa for a rehearing of said case but that such rehearing was denied on or about June 15, 1943.

19. That on November 2, 1943 plaintiff applied to the Adjutant General of the United States Army requesting that a certificate of honorable discharge from the Army of the United States be granted to him and said request was denied on November 20, 1943; that by letter dated January 13, 1944 he requested of the Adjutant General of the United States Army a reconsideration of the said November 20, 1943 action of the Adjutant General; that on or about February 29, 1944 he was notified in writing by the Adjutant General that the office of the Adjutant General of the Army adhered to its former decision of November 20, 1943 denying his claim for a certificate of honorable discharge from the Army of the United States; that then plaintiff instituted this action.

20. That the controversy between plaintiff and defendants is actual and is of a justifiable nature; that plaintiff has been diligent at all times since first obtaining knowledge in the year 1941 that there was any question as to his status as an honorably discharged soldier of the Army of the United States; that prior to the year 1941 his status as an honorably discharged soldier of the Army of the United States was unquestioned; that prior to the year 1941 he had no knowledge that there was any question as to his being an honorably discharged soldier of the Army of the United States; that diligently and since the year 1941 he instituted the actions and took the steps hereinbefore stated to have his status determined and to have issued to him the certificate of honorable discharge from the Army of the United States to which he is lawfully entitled; that defendants still refuse to issue such certificate to plaintiff; that defendants have in no way been prejudiced by lapse of time.

Wherefore plaintiff prays the Court—

I. For a judgment declaring—

(a) That he served as a soldier in the Army of the United States from November 11, 1918 to November 14, 1918, both dates inclusive, and that during said period of time his conduct was such as to warrant his re-enlistment in the Army and that his service was honest and faithful; and

(b) That he never was rejected for Military Service because of physical unfitness; and

(c) That under honorable conditions he was discharged from the Army of the United States by order of the President, which order is dated November 11, 1918 and is Telegram Number B 4292; and

(d) That he is an honorably discharged soldier of the War with Germany (World War I); and

(e) That when he was separated from the Military Service of the United States he was entitled lawfully to a certificate affirmatively showing on its face the fact that his service in the Army was honest and faithful and that he was honorably discharged from the Military Service of the United States by reason of the said order of the President dated November 11, 1918; and

II. As further relief plaintiff prays—

(f) That a mandatory injunction issue from this Court directed to the defendants commanding them to grant and issue to plaintiff a proper and lawful discharge from the Army of the United States as by law provided; and

(g) That the Court grant such other and further relief as it may find just and proper in the premises.

SAMUEL T. ANSELL,
Attorney for Plaintiff,
Tower Building,
Washington, D. C.

Of Counsel:

MAHLON C. MASTERSON,
Tower Building,
Washington, D. C.

ROGER ROBB,
Tower Building,
Washington, D. C.

ANSELL AND ANSELL,
Tower Building,
Washington, D. C.

LANE & WATERMAN,
Davenport Bank Building,
Davenport, Iowa

Soldiers & Sailors Discharge Record
Date July 17 A.D., 1941
Book No. 2nnn Page 584
Benj Zaechler Recorder.

Order of Induction into Military Service of the United States.

THE PRESIDENT OF THE UNITED STATES,

To James Joshua Lacie
(Christian name) (Surname)

Order Number 250 Serial Number _____

Greeting: *Having submitted yourself to a local board composed of your neighbors for the purpose of determining the place and time in which you can best serve the United States in the present emergency, you are hereby notified that you have now been selected for immediate military service.*

You will, therefore, report to the local board named below at 56 Davenport Savings Bank Bldg., (Place of reporting) *at* 9 (Hour of reporting) m., *on the* 11th *day of* November, 19 41, *for military duty.*

From and after the day and hour just named you will be a soldier in the military service of the United States.

[signature]

Member of Local Board for [illegible]

Report to Local Board for [illegible]

Date _____

Exhibit "A"

Sailors & Sailors Discharge Record
Date July 17 A.D. 1941
Book No. Three Page 554
Benj Faesbeler Recorder.

TO REGISTRANTS OF LOCAL BOARDS ONE AND TWO OF THE CITY OF DAVENPORT INCLUDED IN OUTSTANDING CALLS

James John Last
1818 W. 3rd St
Davenport, Iowa.

By order of the Provost Marshal General acting under the instruction of the President of the United States, all outstanding calls for the army, general and special, and orders for individual induction into the army, have been cancelled, and all registrants who were inducted but not entrained under such calls are discharged from the army.

The foregoing cancellation and discharge does not affect any call or competent order for induction into the navy or marine Corps. All registrants whose calls are cancelled, or who are discharged, revert to their status as registrants and are subject to the provisions of the Selective Service Law like other registrants, and are subject to future calls. Accordingly all registrants who received notices to appear for induction under such calls, or who appeared and were inducted but not entrained, are notified that the undersigned Boards have cancelled all such notices and orders of induction, and that such cancellation in cases of registrants who were inducted has the effect of an honorable discharge from the army.

DATED: NOVEMBER 14, 1918.

LOCAL BOARD DIVISION NO. 1, CITY OF DAVENPORT, IOWA.

LOCAL BOARD DIVISION NO. 2, CITY OF DAVENPORT, IOWA.

Exhibit "C"

DISCHARGE FROM DRAFT

Jan. 11 1923
552
Scott Co.

To all whom it may concern:

This is to Certify. That James John Lamb
(Christian name) (Surname)
is hereby DISCHARGED from the military service of the UNITED STATES by order of the President, dated November 11, 1918.

Said James John Lamb
was inducted into the service from the jurisdiction of the Local Board for
Dist. No. 1 Davenport Iowa
on the 11th day of November, 191 .

While this certificate discharges the person named herein from his present obligation to serve in the Army, it does not operate as a permanent bar to his subsequent entrance into the military service. Under Section 5 of the Act of May 18, 1917, all registered persons remain subject to the draft unless exempted or excused as in that Act provided. Therefore, this discharge does not excuse the holder from obedience to the process of Exemption Boards.

Given at Camp Funston, this 14th day of Nov. 191 .

By command of Major General Pershing

[illegible]
Adjutant.
Asst Camp Personnel Adjt.

* Strike out words not applicable.

Form 525, Office A. G. O.
Rev. 5-18.

Exhibit "E"

Exhibit F

17 Filed Oct 28 1944 Charles E. Stewart, Clerk

Copy Copy

War Camp Dodge, Iowa Jan. 25, 1919 15259

Quartermaster

Treasurer of the United States 15-51

(Seal) Pay To The

Order Of Jaines J. Lamb $4.00

Four & No/100 . . . . . Dollars

Object for Which drawn

Vo. No. 3500

Final Pay

/s/ A. A. PADMORE

Quartermaster Corps, N.A. 28476

Exhibit "F"

(Endorsement)

Form Approved By The
Comptrolier Of The Treasury
January 27, 1913.

This check must be indorsed in ink or indelible pencil on the line below by the person in whose favor it is drawn, and the name must be spelled exactly the same as it is on the face of the check.

If indorsement is made by mark (X) it must be witnessed by two persons who can write, giving their places of residence in full.

. . . . . .

(Sign on this line.)

. . . . . .

18 Filed Jan 10 1945

Motion to Dismiss

Comes now the defendants in the above entitled cause and respectfully moves this Court to dismiss the above entitled cause for the following reasons:

1. The complaint on its face shows that the plaintiff is barred from relief by laches.

2. The type of certificate to be given under such circumstances is a matter solely within the discretion of the Secretary of War.

3. The complaint fails to state a cause of action upon which relief may be granted.

4. There is no justiciable controversy between the plaintiff and the defendant.

EDWARD M. CURRAN,
United States Attorney.

DANIEL B. MAHER,
Assistant United States Attorney.

19 Filed May 1 1945

Order

Upon consideration of the motion to dismiss filed by the defendants in the above entitled cause, the Court being fully advised in the matter, and upon the ground that the complaint fails to state a cause of action upon which relief may be granted, it is by this Court this 1st day of May, 1945,

Adjudged, Ordered and Decreed, That the motion to dismiss be, and the same hereby is granted, and the complaint be and the same hereby is dismissed.

MATTHEW F. McGUIRE
Justice

No objection as to form:

ROGER ROBB
Attorney for Plaintiff

Presented by:

DANIEL B. MAHER,
Assistant United States Attorney.

21 Monday, February 4th, A. D. 1946

The Court met pursuant to adjournment. Present: Honorable D. Lawrence Groner, Chief Justice, Harold M. Stephens, Henry W. Edgerton, Bennett Champ Clark, Wilbur K. Miller and E. Barrett Prettyman, Associate Justices.

Before Honorable HENRY W. EDGERTON, WILBUR K. MILLER, and E. BARRETT PRETTYMAN, Associate Justices

* * * * *

No. 9041. January Term, 1946

JAMES JOHN LAMB, APPELLANT

vs.

ROBERT P. PATTERSON, ET AL., APPELLEES.

Argument commenced by Mr. Roger Robb, attorney for appellant, continued by Mr. Daniel B. Maher, attorney for appellee, and concluded by Mr. Roger Robb.

* * * * *

22 United States Court of Appeals, District of Columbia

No. 9041

JAMES JOHN LAMB, APPELLANT

v.

ROBERT P. PATTERSON, SECRETARY OF WAR OF THE UNITED STATES, ET AL., APPELLEES

Appeal from the District Court of the United States for the District of Columbia

Argued February 4, 1946.—Decided March 25, 1946

Mr. Roger Robb, with whom Messrs. Samuel T. Ansell and Mahlon C. Masterson were on the brief, for appellant.

Mr. Daniel B. Maher, Assistant United States Attorney, with whom Messrs. Edward M. Curran, United States Attorney, and Sidney S. Sachs, Assistant United States Attorney, were on the brief, for appellees. Mr. Charles B. Murray, Assistant United States Attorney, also entered an appearance for appellees.

Before EDGERTON, WILBUR K. MILLER, and PRETTYMAN, JJ.

WILBUR K. MILLER, J.: This appeal presents for review an order of the District Court of the United States for the District of Columbia which granted the appellees' motion to dismiss the appellant's complaint. The suit was filed by the appellant to obtain a judicial ruling that he is an honorably discharged soldier of World War I, and a mandatory direction to the appellees to issue to him a certificate of honorable discharge as such.

The factual situation which gave rise to the controversy stretches back more than a quarter of a century. The appellant, James John Lamb, a resident of Davenport, Iowa, was notified on November 9, 1918, by his local draft board that he had been selected for immediate military service. He was ordered to report to the board at 9:00 a. m. on November 11 for military duty. The notice which he received informed Lamb that "from and after the day and hour just named you will be a soldier in the military service of the United States." The appellant reported at the designated time and place and was then notified orally by the local board that he was a soldier in the Army of the United States. By a written warrant of appointment, he was made the leader and special police officer of a contingent of drafted men during the journey from Davenport to Camp Dodge. Pursuant to an oral order given to him later on the morning of November 11, Lamb assembled
23 his contingent and proceeded with it from the office of the local board for the purpose of entraining for the camp.

Before the appellant had actually boarded a train, however, he was told orally that because of the armistice with Germany draft calls had been cancelled. But he was also told that he was still a soldier, subject to military orders and to laws and regulations governing the army, and that he must hold himself in readiness at all times to obey further orders.

On November 15, 1918, Lamb received by mail from his local board a communication dated November 14, 1918, the text of which is shown in the margin.[1] This action was taken by the local board

[1] "By order of the Provost Marshal General acting under the instruction of the President of the United States, all outstanding calls for the army, general and special, and orders for individual induction into the army, have been cancelled, and all registrants who were inducted but not entrained under such calls are discharged from the army.

"The foregoing cancellation and discharge does not affect any call or competent order for induction into the navy or marine corps. All registrants whose calls are cancelled, or who are discharged, revert to their status as registrants and are subject to the provisions of the Selective Service Law like other registrants, and are subject to future calls. Accordingly all registrants who received notices to appear for induction under such calls, or who appeared and were inducted but not entrained, are notified that the undersigned Boards have cancelled all such notices and orders of induction, and that such cancellation on cases of registrants who were inducted has the effect of an honorable discharge from the army."

pursuant to an order of the President, issued through the Provost Marshal General, dated November 11, 1918, which contains the following language:

"The President further directs that all registrants who are already inducted into the Army under these calls because of the fact that the day and hour specified in form ten twenty-eight or entered in column twenty-four of the classification list have arrived, but who have not been actually entrained for a mobilization camp, shall be; and that they are hereby, discharged from the Army."

On or about January 26, 1919, Lamb received a certificate styled "Discharge from Draft" which had been issued at and mailed from Camp Dodge and which was dated as of November 14, 1918. The text of this document is set out in the margin.[2] Accompanying it was a Quartermaster's check for $4.00 bearing the notation "Final Pay," which was in payment for service with the Army for the period from November 11, 1918, to November 14, 1918, both dates inclusive. From that time on Lamb represented himself as having been honorably discharged from the Army of the United States.

24 A statute of Iowa grants tax exemption on "the property not to exceed Five Hundred Dollars in actual value of any honorably discharged soldier, sailor, marine or nurse of the War with Germany." After the enactment of this exemption Lamb annually applied to the taxing authorities of Scott County, Iowa, the place of his residence, for exemption thereunder, and until the year 1940 each annual application was granted by those authorities. But when he presented his verified claim for the statutory exemption for the year 1941, the Board of Supervisors of Scott County claimed that he had not been a soldier, that he had not been honorably discharged from the army, and that his status was merely that of one who had been discharged from the draft.

Immediately following this occurrence, Lamb sued the members of the Board of Supervisors in the state court at Davenport, alleging that he was an honorably discharged soldier of the war with Germany and that the supervisors had acted illegally in denying him the tax exemption. He prayed that the court declare

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[2] "To all whom it may concern:
"This is to Certify, That James John Lamb is hereby DISCHARGED from the military service of the UNITED STATES by order of the President, dated November 11, 1918.
"Said James John Lamb was inducted into the service from the jurisdiction of the Local Board for Div. #1, Davenport, Iowa, on the 11th day of November 1918.
"While this certificate discharges the person named herein from his present obligation to serve in the Army, it does not operate as a permanent bar to his subsequent entrance into the military service. Under Section 5 of the Act of May 18, 1917, all registered persons remain subject to the draft unless exempted or excused as in that Act provided. Therefore, this discharge does not excuse the holder from obedience to the process of Exemption Boards."

him to have been honorably discharged and, therefore, entitled to the tax exemption. In May 1942 the Scott County District Court adjudged that "James J. Lamb is an honorably discharged soldier of the War with Germany which frequently is called World War I." Thereafter the Board of Supervisors appealed to the Supreme Court of Iowa and on March 9, 1943, that court reversed, a majority and a dissenting opinion being filed. In the course of the majority opinion it was said, "we feel there is a serious doubt upon the question whether the appellee is an honorably discharged soldier of the War with Germany within the meaning of Section 6946 Code of Iowa 1939."[3] A rehearing was denied on June 15, 1943.

On November 2, 1943, the appellant applied to the Adjutant General of the United States Army for a certificate of honorable discharge. The request was denied on November 20, 1943. Lamb endeavored to get the Adjutant General to reconsider, but that official finally informed him on February 29, 1944, that he adhered to his original denial of the claim. Lamb then filed suit in the District Court of the United States for the District of Columbia against Henry L. Stimson, then Secretary of War, and J. A. Ulio, then The Adjutant General of the United States Army. In his complaint he recited in detail the facts which we have summarized, and prayed that the court declare that he had been a soldier in the Army of the United States from November 11, 1918, to November 14, 1918, both dates inclusive, and that during that period his conduct was such as to warrant his reenlistment in the army and that his service was honest and faithful; that he was not rejected because of physical unfitness; that he is an honorably discharged soldier of the war with Germany and that he is entitled to a certificate showing that his service in the army was honest and faithful; and that he was honorably discharged from military service by reason of the order of the President, dated November 11, 1918. He further prayed that the court mandatorily direct the defendants to issue to him "a proper and lawful discharge from the Army of the United States as by law provided. . . ."

The District Court granted the defendants' motion to dismiss on the ground that the complaint failed to state a cause of action upon which relief could be granted. This appeal followed.

25 The appellees, who were defendants below, argue that the certificate of Discharge from Draft was in accordance with law and regulation; that the issuance of an honorable discharge certificate is a discretionary act which cannot be controlled by mandamus; and that the appellant was guilty of laches.

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[3] Lamb v. Kroeger, 8 N. W. (2d) 405.

The first question, therefore, to which we address ourselves is whether the certificate of Discharge from Draft, Form No. 638–1, A. G. O., which was issued to the appellant, was in accordance with law and regulation. There can be no question that Lamb was an enlisted man, lawfully inducted into the military service of the United States. He had received an order of induction, which informed him that from and after 9:00 a. m., November 11, 1918, he would be a soldier in the military service of the United States. The President's order of November 11, 1918, recites that men who have already been inducted into the army because of the arrival of the day and hour specified in the order of induction, but who have not been actually entrained for a mobilization camp, "are hereby discharged from the Army." The Discharge from Draft reads that Lamb "is hereby discharged from the military service of the United States." He was paid for four days of military service.

It is provided by the 108th Article of War, Act of August 29, 1916, ch. 418, 39 Stat. 668, that "No enlisted man, lawfully inducted into the military service of the United States, shall be discharged from said service without a certificate of discharge, signed by a field officer of the regiment or other organization to which the enlisted man belongs, or by the commanding officer when no such field officer is present. * * *" By the Selective Draft Act of May 18, 1917, ch. 15, 40 Stat. 70, persons drafted into the service of the United States were made subject to the laws and regulations governing the Regular Army, hence the quoted portion of the 108th Article of War applied to the appellant.

The Secretary of War was authorized by the Act of June 8, 1872 (17 Stat. 283, 5 U. S. C. A. 22) to promulgate regulations providing for such forms of discharge as he thought reasonably required. Under this authority, the Secretary of War promulgated paragraph 150 of the Army Regulations providing for three classes of discharge certificates: honorable discharge, discharge, and dishonorable discharge.[4]

This regulation continued to be the sole pronouncement of the Secretary of War concerning forms of certificates of dis-
26 charge until the passage of the Selective Draft Act made it necessary, in official opinion, to provide other forms of certificates. By a regulation dated January 12, 1918, certificates

[4] Paragraph 150 of the Army Regulations is as follows:

"150. Blank forms for discharge and final statements will be furnished by the Adjutant General's Department and will be retained in the personal custody of company commanders. Discharge certificates will be used in the discharge of enlisted men and for no other purpose, and will be of three classes: For honorable discharge, for discharge, and for dishonorable discharge.

"They will be used as follows:

"1. The blank for honorable discharge, when the soldier's conduct has been such as to warrant his reenlistment and his service has been honest and faithful.

"2. The blank for dishonorable discharge, for dishonorable discharge by sentence of a court martial or a military commission.

"3. The blank for discharge when the soldier is discharged except as specified under sections 1 and 2 of this paragraph (C. A. R. Nos. 14 and 34)."

called "Discharge from Draft" were authorized for those who were inducted but failed to pass the physical examination at the place of mobilization. This regulation has no application to the case before us, as the appellant was not rejected for physical unfitness. As far as the appellant was concerned, at the time of his separation from the military service, official regulations authorized only the three forms of discharge provided for by paragraph 150 of the Army Regulations. Hence, the certificate of discharge issued to the appellant should have been on one of those three forms; and that which would have been appropriate should have been determined under paragraph 150 of the Regulations.

The appellees place reliance on a regulation promulgated December 4, 1918, which provides for registrants who, although inducted by local boards, had not arrived at a place of mobilization when they were discharged under the President's order of November 11, 1918. By this regulation, there was to be issued to such persons "a discharge certificate on a new blank form (Form No. 638–1, A. G. O.)." The certificate of discharge which was received by the appellant was on this form. It was mailed to him from Camp Dodge, and was received by him at Davenport, Iowa, on or about January 26, 1919, although it purports to have been issued at Camp Dodge on November 14, 1918.

It should be noted that the regulation of December 4, 1918, refers to Form No. 638–1 A. G. O., as "a new blank form." Such a certificate of discharge, not having been officially authorized prior to December 4, 1918, should not have been issued to soldiers who were discharged prior to that date and who were entitled, under law and regulation, to the appropriate form of the three kinds of certificates authorized by paragraph 150 of the Army Regulations. It is obvious here that Lamb's certificate was antedated to November 14, 1918, by the officer who actually issued it in January 1919. That officer was the first to make the official error which has been persisted in by the appellees since that time. It is quite clear that the appellant was and is entitled to a certificate of honorable discharge,[5] unless it was within the official discretion of the Secretary of War, on November 14, 1918, to issue to him some other form of discharge certificate, or unless his claim to relief in this action is barred by laches.

We proceed to the second contention of the appellees which is that the issuance of an honorable discharge certificate is a discretionary act and not subject to control by mandamus. It is urged upon us that it rests in the sound discretion of the Secretary of War whether to issue a certificate of honorable discharge to a soldier separated from the service, and that we should not

[5] Davis v. Woodring, 111 F. (2d) 523, 72 App. D. C. 83.

substitute our judgment for that of the Secretary as to the quality of appellant's service and his character as exhibited during that service.

It must be conceded that the determination originally of the several forms of certificates of discharge was a proper exercise of the executive authority of the Secretary; but, having exercised that authority and having defined the three types of certificates to be issued, and having by regulation established
27 standards to govern the selection of the proper form to be issued to each discharged soldier, the executive authority of the Secretary had been fully exercised, and the duty of the army officer at Camp Dodge in issuing a certificate of discharge to the appellant was simply ministerial, as though the regulation had been a statute.[6] That officer did not have, and indeed the Secretary himself would not have had, the right arbitrarily to issue to Lamb any form of discharge certificate other than that which was appropriate to his status according to the standards set up in paragraph 150 of the Army Regulations. True it is that the Secretary again could exercise his executive authority to provide for additional and different forms of discharge, as he did by the regulations of January 12, 1918, and again on December 4, 1918; but, once standards are erected by regulation, it is merely ministerial to observe them. Consequently, it is incorrect to say, as the appellees do, that whether the appellant is entitled to a certificate of honorable discharge rests in the sound discretion of the Secretary of War.[7]

The court does not substitute its judgment for that of the Secretary as to the quality of appellant's service and his character as exhibited during that service. The Secretary determined, by paragraph 150 of the Army Regulations, that the blank for honorable discharge must be used "when the soldier's conduct has been such as to warrant his reenlistment and his service has been honest and faithful." The appellant's complaint, against which the appellees' motion to dismiss was leveled, alleges that the appellant's conduct was such as to warrant his reenlistment and that his service had been honest and faithful. The motion to dismiss has the effect of admitting these facts. So, for the purpose of considering the motion to dismiss, it is the Secretary's considered judgment, expressed in paragraph 150, that Lamb is entitled to an honorable discharge.

Reid v. United States, 161 Fed. 469, cited by the appellees, was decided by a district court in New York in 1908. In that opinion the court said that the exact method of a soldier's discharge and the kind of character that should be given him, not being regulated

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[6] Arizona Grocery Co. v. A. T. & S. F. Ry. Co., 284 U. S. 370, 386.
[7] Miguel v. McCarl, 291 U. S. 442.

by statute, necessarily must be left to the discretion of the executive officer having power to grant some kind of discharge; and that army regulations do not bind the Secretary of War who promulgates them. We do not regard the citation as authority here for several reasons. Reid was discharged without honor for having participated in a riot, and filed suit to recover the pay and emoluments which would have accrued to him from the date of his discharge to the expiration of his three-year term of enlistment. It will thus be seen that the statement in the opinion to which we have referred was *obiter dictum*. Reid's writ of error was dismissed by the Supreme Court on procedural grounds,[8] and no reference was made to the gratuitous statement of the district court cited by the appellees here in support of their position. Furthermore, the statement is not in accord with the view of this court expressed in Davis v. Woodring, supra, and we do not regard it as sound.

28 It remains only to consider whether the remedy sought by the appellant is barred by laches, as argued by the appellees. Twenty-five years elapsed from the time the appellant received his discharge certificate until he first attempted to obtain a certificate of honorable discharge, as the appellees pointed out. But laches is not like limitation, a mere matter of time. Although the appellant was discharged on November 14, 1918, and received a certificate of Discharge from Draft on January 25, 1919, he was told on November 15, 1918, by his local board that the Presidential order of November 11, 1918, discharging from the army all registrants who had been inducted but not entrained, had "the effect of an honorable discharge from the army."[9] Until 1941, the appellant had no basis for supposing that there was any doubt concerning his status as an honorably discharged soldier. When that status was challenged for the first time, he manifested extraordinary diligence in asserting his rights. Moreover, the appellees do not claim that there has been any change of condition or relations since 1918 because of which it would be an injustice to them to permit the appellant to assert his rights now. Bearing in mind the essential elements of laches,[10] it is our opinion that the appellant's action is not barred by that defense.

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[8] 211 U. S. 529.

[9] Note 1 supra.

[10] In Galliher v. Cadwell, 145 U. S. 368, 372, will be found the following discussion of laches by the Supreme Court:

"The cases are many in which this defense has been invoked and considered. It is true, that by reason of their differences of fact no one case becomes an exact precedent for another, yet a uniform principle pervades them all. They proceed on the assumption that the party to whom laches is imputed has knowledge of his rights, and an ample opportunity to establish them in a proper forum; that by reason of his delay the adverse party has good reason to believe that the alleged rights are worthless or have been abandoned; and that because of the change in condition or relations during this period of delay, it would be an injustice to the latter to permit him to now assert them."

Since it is our view that in his complaint the appellant pleaded facts which, if sustained by proof, entitled him to the relief sought, it follows that the District Court erred in granting the appellees' motion to dismiss.

Reversed.

29 United States Court of Appeals for the District of Columbia

No. 9041. January Term, 1946

JAMES JOHN LAMB, APPELLANT

vs.

HENRY L. STIMSON, SECRETARY OF WAR OF THE UNITED STATES, ET AL., APPELLEES

United States Court of Appeals for the District of Columbia. Filed Mar. 25, 1946. Joseph W. Steward, Clerk.

Appeal from the District Court of the United States for the District of Columbia

Before EDGERTON, WILBUR K. MILLER, *and* PRETTYMAN, JJ.

Judgment

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Columbia, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of the said District Court appealed from in this cause be, and the same is hereby, reversed, and that this cause be, and it is hereby, remanded to the said District Court for further proceedings not inconsistent with the opinion of this Court.

Per MR. JUSTICE WILBUR K. MILLER.

Dated March 25, 1946.

United States Court of Appeals for the District of Columbia

No. 9041. January Term, 1945

JAMES JOHN LAMB, APPELLANT

vs.

HENRY L. STIMSON, ET AL., APPELLEES

Order

On consideration of appellant's motion to substitute Robert P. Patterson, Secretary of War, as party appellee herein in
30 the place and stead of Henry L. Stimson, Secretary of War, resigned, and it appearing to the Court that counsel for Robert P. Patterson, Secretary of War, consents thereto, It is

Ordered by the Court that Robert P. Patterson, Secretary of War, be, and he is hereby, substituted as party appellee herein in the place and stead of Henry L. Stimson.

PER CURIAM.

Dated November 2, 1945.

United States Court of Appeals for the District of Columbia. Filed Nov. 2, 1945. Joseph W. Stewart, Clerk.

United States Court of Appeals for the District of Columbia

No. 9041. January Term, 1946

JAMES JOHN LAMB, APPELLANT

v.

ROBERT P. PATTERSON, ET AL., APPELLEES

Order

On consideration of appellant's motion to substitute Edward F. Witsell, The Adjutant General, as party appellee in the place and stead of appellee J. A. Ulio, his predecessor as Adjutant General, and it appearing that Edward F. Witsell, The Adjutant General, consents to this motion to substitute, It is

Ordered by the Court that Edward F. Witsell, The Adjutant General, be, and he is hereby, substituted as party appellee in the place and stead of appellee J. O. Ulio.

PER CURIAM.

Dated March 30, 1946.

United States Court of Appeals for the District of Columbia. Filed Mar. 30, 1946. Joseph W. Stewart, Clerk.

United States Court of Appeals for the District of Columbia

No. 9041

JAMES JOHN LAMB, APPELLANT

v.

ROBERT P. PATTERSON, SECRETARY OF WAR OF THE UNITED STATES, AND EDWARD F. WITSELL, THE ADJUTANT GENERAL OF THE UNITED STATES ARMY, APPELLEE

United States Court of Appeals for the District of Columbia. Filed June 4, 1946. Joseph W. Stewart, Clerk.

31 *Designation of record*

The Clerk will please prepare a certified transcript of record for use on petition to the Supreme Court of the United States for writ of certiorari in the above-entitled cause, and include therein the following:

1. Appendix to appellant's brief.
2. Minute entry of argument.
3. Opinion.
4. Judgment.
5. Order substituting Robert P. Patterson for Henry L. Stimson as Secretary of War of the United States, Appellee.
6. Order substituting Edward F. Witsell for J. A. Ulio as The Adjutant General of the United States Army, Appellee.
7. This designation.
8. Clerk's certificate.

(S) J. Howard McGrath,
J. HOWARD MCGRATH,
Solicitor General.

Service of copy of the above designation of record in the above-entitled case is hereby acknowledged this 4th day of June, 1946.

(S) SAMUEL T. ANSELL,
Of Counsel for Appellant.

United States Court of Appeals for the District of Columbia

I, Joseph W. Stewart, Clerk of the United States Court of Appeals for the District of Columbia, hereby certify that the foregoing pages numbered from 1 to 32, constitute a true copy of the joint appendix to the briefs of the parties and the proceedings of the said Court of Appeals as designated by counsel for the appellees in the case of:

JAMES JOHN LAMB, APPELLANT

vs.

ROBERT P. PATTERSON, SECRETARY OF WAR OF THE UNITED STATES, ET AL., APPELLEE

No. 9041, April Term, 1946, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court of Appeals, at the city of Washington, this twelfth day of June, A. D. 1946.

[SEAL] (S) JOSEPH W. STEWART,
Clerk of the United States Court of Appeals for the District of Columbia.

32 In the Supreme Court of the United States of America

No. 9041. October Term, 1945

ROBERT P. PATTERSON, SECRETARY OF WAR OF THE UNITED STATES, AND EDWARD F. WITSELL, THE ADJUTANT GENERAL OF THE UNITED STATES ARMY, PETITIONERS

v.

JAMES JOHN LAMB, RESPONDENT

Stipulation

Subject to this Court's approval, it is hereby stipulated and agreed by and between counsel for the respective parties to the above-entitled case that:

1. For the purpose of the petition for a writ of certiorari and, in the event the petition be granted, for the purpose of hearing and determining the case on the merits, the printed record shall consist of the following:

a. Joint Appendix to appellant's brief.

b. The proceedings had before the United States Court of Appeals for the District of Columbia as set forth in the Designation of Record filed by the Petitioner (the Clerk may by proper note show the substitution of parties which occurred during the pendency of the case in the Court of Appeals instead of printing the orders authorizing such substitution).

2. Petitioner will cause the Clerk of the United States Court of Appeals for the District of Columbia to file with the Clerk of the Supreme Court the entire transcript of record in the Court of Appeals for the District of Columbia, and any of the parties may

refer in their briefs and arguments to said transcript of record, including any part which has not been printed.

J. Howard McGrath,
J. HOWARD MCGRATH,
Solicitor General.

JUNE 4, 1946.

Samuel T. Ansell,
SAMUEL T. ANSELL,
Attorney for Respondent.

JUNE 4, 1946.

33 Supreme Court of the United States

Order allowing certiorari

(Filed October 14, 1946)

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia, is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

U. S. GOVERNMENT PRINTING OFFICE: 1946

FILE COPY

JUN 24 1946

No. 229

In the Supreme Court of the United States

OCTOBER TERM, 1946

ROBERT P. PATTERSON, SECRETARY OF WAR, AND EDWARD F. WITSELL, THE ADJUTANT GENERAL, UNITED STATES ARMY, PETITIONERS

v.

JAMES JOHN LAMB

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

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In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 229

ROBERT P. PATTERSON, SECRETARY OF WAR, AND EDWARD F. WITSELL, THE ADJUTANT GENERAL, UNITED STATES ARMY, PETITIONERS

v.

JAMES JOHN LAMB

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

The Solicitor General on behalf of Robert P. Patterson, Secretary of War, and Edward F. Witsell, The Adjutant General, United States Army, prays that a writ of certiorari issue to review the judgment entered in this case on March 25, 1946, by the United States Court of Appeals for the District of Columbia.

OPINION BELOW

The district court did not render an opinion. The opinion of the Court of Appeals (R. 22–28) is reported at 154 F. 2d 319.

JURISDICTION

The judgment of the Court of Appeals was entered on March 25, 1946 (R. 29). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether a court may, by mandamus, order the Secretary of War to issue an "Honorable Discharge from the Army" to an individual who received a "Discharge from Draft" in 1918, over 25 years prior to the institution of suit, where such individual simply reported for induction on November 11, 1918, returned to his home on that day because of the cancellation of all draft calls by order of the President, never entrained for travel to a military camp, never wore the uniform, and never was accepted for military service by the Army.

STATUTES AND REGULATIONS INVOLVED

The pertinent portions of the statute and regulations involved are set out in the Appendix, *infra*, pp. 20–25.

STATEMENT

Pursuant to the provisions of Section 2 of the Selective Draft Act of 1917 (c. 15, 40 Stat. 76, 77–78) and regulations promulgated thereunder, respondent James John Lamb was ordered by the local draft board at Davenport, Iowa, to report

for military duty at 9:00 A. M. on November 11, 1918 (R. 2–3). The order recited that "From and after the day and hour just named you will be a soldier in the military service of the United States" (R. 13). He reported at the time and place fixed in the order and was appointed leader of a contingent of drafted men who were to travel to Camp Dodge (R. 3–4). Before actually entraining for camp, however, he was orally notified by the local board that he should not entrain because of cancellation of all calls for induction and mobilization (R. 4–5). The cancellation had been made by order of the Provost Marshal General under instructions of the President, the contents of the order being communicated to all State draft executives by telegram on November 11, 1918 (R. 16). On November 15, 1918, respondent was notified in writing by his local board of the cancellation order and was advised that "such cancellation in cases of registrants who were inducted has the effect of an honorable discharge from the army" (R. 5, 15). On January 26, 1919, respondent received a certificate entitled "Discharge From Draft" on Form 638–1, A. G. O., dated November 14, 1918 (R. 5–6, 17).[1]

[1] We point out below, pp. 11–12, that Form 638–1 was adapted from Form 638 (Appendix, *infra*, p. 21), which was used for the discharge of men rejected at the mobilization camps for various reasons. The use of Form 638 was authorized by War Department Circular No. 651 of January 12, 1918 (Appendix, *infra*, pp. 21–22).

For a number of years prior to 1940, respondent claimed and received under the tax statutes of Iowa a $500 exemption, applicable to the property of "any honorably discharged soldier." In 1941, the State authorities denied him the exemption, a denial which was upheld by the Iowa Supreme Court. *Lamb* v. *Kroeger*, 233 Iowa 730, decided March 9, 1943, rehearing denied, June 18, 1943. The court relied in part on an opinion of the Attorney General of Iowa, rendered in 1922, to the effect that persons holding Discharges from Draft were not within the exemption statute, but decided the case purely as a matter of state law, saying (233 Iowa at 734): "We are here concerned with what the Iowa Legislature, not draft-law administrators, or United States Government officials, meant by the term 'honorably discharged soldier * * * of the war with Germany.'"

Thereafter, respondent applied to The Adjutant General, United States Army, for a certificate of Honorable Discharge, and, upon denial of the application, brought this suit in the District Court of the United States for the District of Columbia against the then Secretary of War and the then Adjutant General,[2] seeking a declaratory judgment that respondent was entitled to a certificate of Honorable Discharge, and seeking also a mandatory injunction directing the petitioners to

[2] The present petitioners, successors in office, were duly substituted in the court below (R. 29–30).

issue such a certificate. The case was heard on an amended complaint (R. 2–19)—filed on October 28, 1944, nearly 26 years after respondent's release from military service—and a motion to dismiss (R. 19–20). The motion was sustained by the district court, which ordered the complaint dismissed (R. 20).

On appeal, the court below reversed, holding that respondent was entitled to an Honorable Discharge by virtue of Paragraph 150 of the Army Regulations then in force (R. 25–26; Appendix, *infra*, pp. 20–21). The court held that Discharges for Draft, issued under Circular No. 651 of January 12, 1918 (*infra*, pp. 21–22), were appropriate only for men rejected at the mobilization rendezvous;[3] that Form 638–1, discharging men by reason of the President's order of November 11, 1918, suspending further draft calls, was first "officially authorized" by Circular No. 111 of December 4, 1918 (Appendix, *infra*, pp. 22–23); and that that Circular could not be applied to a separation which occurred before its effective date (R. 26–27. The court refused to hold that respondent had been guilty of laches, saying that until the decision of the Iowa Supreme Court he "had no basis for supposing that there was any doubt concerning his status as an honorably discharged soldier" (R. 28).

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[3] Under Selective Service Regulations (1917–18) Nos. 174–177, draftees were not finally accepted or rejected for military service until after examination at the mobilization camp.

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals erred:

1. In holding that the amended complaint stated a claim upon which relief could be granted.

2. In holding that an action seeking a mandatory injunction could be maintained against petitioners in the instant case.

3. In holding that respondent was entitled to an "Honorable Discharge from the Army."

4. In holding that the "Discharge from Draft" issued to respondent was not authorized by law.

5. In holding that it could interfere with the Secretary of War and The Adjutant General of the Army in a matter relating to the internal administration of the military service.

6. In failing to hold that respondent was barred by his laches from maintaining the instant suit.

7. In reversing the District Court.

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals strikes down administrative action of the War Department of more than twenty-five years' standing, and, if not reversed, constitutes an unwarranted and burdensome intrusion into the realm of orderly military administration. It holds that an individual who was never accepted for service by the Army, who never wore the uniform, and who never even entrained to go to a mobilization camp, is entitled, as a matter of law, to an "Honorable

Discharge from the United States Army", on a parity with those who actually served, and in a more advantageous position than those who proceeded to the mobilization camp and were there rejected by the Army. It reaches that result on a misinterpretation of applicable War Department regulations, and in disregard of legal principles hitherto generally accepted. The decision below is in conflict with the ruling of the Court of Claims in *Palmer* v. *United States,* 72 C. Cls. 401, and fails moreover to give proper effect to decisions of this Court governing the scope of control by mandamus of the actions of executive officers.

1. The only statutory provision governing discharges which was in force at the date of Lamb's discharge was the 108th Article of War of the 1916 Code (Act of August 29, 1916, c. 418, 39 Stat. 619, 668, Appendix, *infra,* p. 20). This provided that no person lawfully inducted into the military service of the United States should be discharged without a certificate of discharge, and, further, that no enlisted man should be discharged prior to the expiration of his term of service except, *inter alia,* by order of the President or the Secretary of War. The statute did not prescribe the form, terms, or type of certificate, leaving these matters to the unfettered discretion of the civil heads of the military establishment; by its terms it granted the enlisted man

only the right to a certificate of discharge, not to any particular kind of certificate.

The court below, until its decision in the present case, had applied the well settled principle, deduced from the 108th Article of War of 1916 and its statutory predecessors,[4] that since the individual discharged from the military service was not entitled by law to any particular form of discharge, he could not, if dissatisfied with the type of certificate issued him, resort to the courts for relief (*Davis* v. *Woodring,* 111 F. 2d 523 (App. D. C.)); and the rule was the same whether he sought a writ of mandamus against the Secretary (*Davis* v. *Woodring, supra*) or whether he sued for back pay claimed to be due him (*Reid* v. *United States,* 161 Fed. 469 (S. D. N. Y., *per* Hough, D. J.), writ of error dismissed for want of jurisdiction, 211 U. S. 529; *Palmer* v. *United States,* 72 C. Cls. 401). Indeed, the law on this point had been deemed so firmly established—prior to the decision below—that new legislation was required when Congress desired to provide for review of the forms of discharge issued to

[4] Similar provisions appeared in earlier military codes. See AW 4 of the Code of 1874 (R. S. 1342); AW 11 of the Code of 1806 (Act of April 10, 1806, c. 20, 2 Stat. 359, 361); AW 13 of the Code of 1786 (Res. of May 31, 1786, 30 J. Cont. Cong. 316, 319), continued in force under the Constitution by Sec. 4 of the Act of Sept. 29, 1789, c. 25, 1 Stat. 95, 96.

The present 108th Article of War (Act of June 4, 1920, c. 227, 41 Stat. 759, 809; 10 U. S. C. 1580) is identical with the same article of the 1916 Code.

veterans of World War II. Section 301, Servicemen's Readjustment Act of 1944, Act of June 22, 1944, c. 268, 58 Stat. 284, 286-287, 38 U. S. C., Supp. IV, 693h.[5]

The court below was consequently in error when it held that it could control by mandatory injunction the character of discharge certificate issued to respondent. It also erred in holding that the Secretary of War was so far bound by his own regulations that, not having anticipated the Armistice nor the circumstance that the cessation of hostilities with Germany would result in a suspension of draft calls, he was bound to issue an Honorable Discharge from the Army to the respondent—who had never been accepted by the Army, who had never entrained for the mobilization rendezvous, and who is careful not to allege that he even proceeded as far as the railroad station.[6]

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[5] See the remarks of Mr. McCormack discussing Section 301 in the House (90 Cong. Rec. 4538): "We felt that some machinery should exist in the Navy Department and the War Department whereby veterans could have a review without the necessity of having their discharges corrected by specific acts of Congress."

[6] In the opinion of the Iowa Supreme Court in *Lamb* v. *Kroeger*, 233 Iowa 730, *supra*, a case tried on an agreed stipulation of facts, it appears that after respondent was appointed leader of the contingent, "the entire contingent went to the Hotel Dempsey, in Davenport, for lunch before entraining for Camp Dodge in Des Moines. While at lunch, a board member arrived and told them that they would not entrain for Camp Dodge because 'calls had been cancelled.' He also

But the law does not require that the Secretary of War have second sight; it holds that he is not bound by his own regulations (*Smith* v. *United States*, 24 C. Cls. 209; *Reid* v. *United States*, *supra*), so that he is free to deal with contingencies up to then unprovided for, as these may occur. It is to be noted that there is here no question of discrimination, nor any suggestion that respondent was treated differently from any other of some 56,000 inducted individuals whose nonacceptance for service was a consequence of the Armistice and the November 11, 1918, order cancelling further draft calls.

But the basic and all-permeating error of the court below was its assumption that the form of discharge issued to respondent was not authorized by the regulations in force at the date of his discharge (R. 26-27). The contrary is the fact.

As early as January 12, 1918, the War Department by Circular No. 651 (Appendix, *infra*, pp. 21-22) had provided that men who had reported for induction but who were rejected by the Army on any one of several grounds—and the Circular did not purport to restrict the grounds or reasons for which a given individual might be rejected—would not be given an Honorable Discharge, but would be issued a Discharge from Draft on Form

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stated that the members of the contingent were dismissed and that written notice of the cancellation would be mailed to each of them." 233 Iowa at 732.

638, A. G. O., together with pay until date of discharge.[7] This "Discharge from Draft" was all that was issued rejected men, even though prior to rejection they may have worn the uniform and performed the duties of a soldier. See *Davis* v. *Woodring,* 111 F. 2d 523 (App. D. C.). The "Honorable Discharge from the United States Army", with its recital that it is given the bearer "as a Testimonial of Honest and Faithful Service" (Appendix, *infra,* p. 25), was reserved for those who had actually been accepted for the Army at the mobilization rendezvous. Cf. *Bannister* v. *Soldiers Bonus Board,* 43 R. I. 346; *Zearing* v. *Johnson,* 10 Cal. App. 2d 654.[8]

The form of "Discharge for Draft", Form 638, A. G. O., was just as nonrestrictive as the Circular under which it was first authorized; it provided a space in which the reason for discharge was to be

[7] Under the terms of the Selective Draft Act of 1917, men were subject to military law from the time they were ordered to report for induction. *Franke* v. *Murray,* 248 Fed. 865 (C. C. A. 8); *Ex parte Bergdoll,* 274 Fed. 458 (D. Kan.); *United States ex rel. Feld* v. *Bullard,* 290 Fed. 704 (C. C. A. 2), certiorari denied, 262 U. S. 760; *United States* v. *McIntyre,* 4 F. 2d 823 (C. C. A. 9); *United States ex rel. Bergdoll* v. *Drum,* 107 F. 2d 897, certiorari denied, 310 U. S. 648. Under the Selective Training and Service Act of 1940, however, selectees were not subject to military law until they had been accepted and had taken the oath. *Billings* v. *Truesdell,* 321 U. S. 542.

[8] See also 40 Op. Att'y Gen., No. 103, holding that a person inducted by a local board on November 11, 1918, and discharged two hours later by the cancellation of all draft calls did not serve "on active duty."

inserted.[9] The same form could have been used without change for the discharge of men not accepted because of the Armistice and the attendant cancellation of draft calls. And as a matter of fact, all that Form 638–1 did was to print that reason, *viz.*, "by order of the President, dated November 11, 1918," which previously was required to be specially inserted in each instance. Indeed, proof that Form 638–1 did not depend for its validity on Circular No. 111 of December 4, 1918, appears on the very face of the "Discharge from Draft" actually issued respondent (Ex. E, R. 17), which shows that it was devised on "Nov. 19–18." All that Circular No. 111 did was to bring the change generally to the attention of the service; it did not signalize any departure from preexisting practice.

The decision below, therefore, not only encroaches on a field of military administration committed by law to the Secretary of War, but, once operating in that realm, proceeds to misapply the governing regulations. As this Court prophetically observed more than a century ago, "The interference of the courts with the performance of the ordinary duties of the executive departments of the government, would be productive of nothing but mischief; and we are satisfied, that such

[9] The footnote on Form 638 reads, "This form will be used for discharge of aliens and alien enemies and of men rejected on account of physical unfitness, dependency, etc."

a power was never intended to be given to them." *Decatur* v. *Paulding*, 14 Pet. 497, 516, quoted with approval in *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113, 131–132.

2. The decision below is in conflict with *Palmer* v. *United States*, 72 C. Cls. 401. In that case, Palmer had enlisted in the Coast Guard, but before expiration of his enlistment had been discharged by his commanding officer contrary to the provisions of the applicable regulations. He thereupon brought suit in the Court of Claims for back pay for the unexpired period of his enlistment, alleging that the discharge was invalid because not effected as provided in the regulations. The court rejected his claim, saying (pp. 405–406):

> * * * Any regulation which the Secretary [of the Treasury] may have made could be set aside by him at any time and a new and different one promulgated * * *.
>
> * * * Nothing is expressed in the enlistment papers of plaintiff as to what reasons shall be sufficient for a discharge, nor is there anything that would indicate that he could only be discharged in accordance with certain regulations made by the Treasury Department. If the commanding officer of plaintiff failed to observe some regulation made by the Treasury in making the discharge, he could be called to account by the Secretary of the Treasury should that

> official see fit. But as long as no statute was violated by the manner of plaintiff's discharge, the fact that it was not in accordance with some Treasury directions can not, in our opinion, avail him.
>
> * * * It appears to be well settled not only by court decisions but by an unbroken practice in the military service which dates back to a time long preceding the organization of our Government that the courts will not interfere with or review the actions of proper officers in the military forces done in some administrative proceeding and not in conflict with any statute.

Even if it be conceded *arguendo* that respondent's discharge here involved a non-compliance with regulations, it was clearly not in conflict with any statute. Consequently, the action of the court below in undertaking to "interfere with or review the actions of proper officers in the military forces done in some administrative proceeding and not in conflict with any statute" is squarely opposed to the ruling of the Court of Claims in the *Palmer* case, *supra*.

3. The decision below fails to give proper effect to applicable decisions of this Court as to the scope of relief by injunction in the nature of mandamus.

It is well settled that such relief will be granted against administrative officials only when their duty in a particular situation is so plainly prescribed as to be free from doubt and equivalent

to a positive command. *United States ex rel. Girard Co.* v. *Helvering,* 301 U. S. 540, 543; *Wilbur* v. *United States,* 281 U. S. 206, 218–219; *Litchfield* v. *Register and Receiver,* 9 Wall. 575, 577. Such, plainly, is not the situation here. The function of mandamus is to compel the performance of a ministerial duty; it may not be used "to direct the exercise of judgment or discretion in a particular way nor to direct the retraction or reversal of action already taken in the exercise of either." *Wilbur* v. *United States, supra,* at 218–219; *Miguel* v. *McCarl,* 291 U. S. 442, 451. Here the action of the Secretary of War was taken in the exercise of his judgment and discretion in a matter affecting the military service, and in respect of which unlimited discretion had been committed to him by Congress when it enacted the 108th Article of War (*infra,* p. 20). Consequently, mandamus would not be a proper remedy even if he had erred, absent a showing of arbitrariness or capriciousness—and no such showing is made here. *Ness* v. *Fisher,* 223 U. S. 683; *Alaska Smokeless Coal Co.* v. *Lane,* 250 U. S. 549; *Work* v. *Rives,* 267 U. S. 175; *Decatur* v. *Paulding,* 14 Pet. 497.

The court below applied in this case the same principles with respect to the scope of relief in the nature of mandamus that it held applicable in *Santa Fe Pacific R. Co.* v. *Ickes,* 153 F. 2d 305 (App. D. C.), certiorari granted June 10, 1946, *sub nom. Krug* v. *Santa Fe Pacific R. Co.,* Nos.

97–98, this Term. The same reasons that prompted this Court to review the decision of the court below in the *Santa Fe* case equally require a review of the decision in the present case.

4. Moreover, respondent's claim, whatever may have been its original merits, is now barred by laches; a delay of over a quarter of a century in resorting to judicial process is obviously unreasonable.[10] The doctrine of laches is based upon the public policy of discouraging stale claims. *Mackall* v. *Casilear,* 137 U. S. 556, 566. A neglected right, if neglected too long, will be treated as an abandoned right which no court will enforce. *Moran* v. *Horsky,* 178 U. S. 205, 208. Even a short delay has been held to constitute such laches as would bar an action for mandamus. Cf. *Arant* v. *Lane,* 249 U. S. 367. And the circumstance that the Iowa Supreme Court did not decide against respondent's claim for tax exemption until 1943, in *Lamb* v. *Kroeger,* 233 Iowa 730, is no excuse for his delay in bringing the present action. For that decision disclosed no fact hitherto unknown; it dealt solely with the construction of a state statute granting a tax exemption. The Iowa court reached that construction as a matter of state law, following a ruling of the Attorney General of Iowa made in 1922 (1922 A. G. O., 194;

[10] It may be significant in this connection that the review of discharges authorized by Section 301 of the Servicemen's Readjustment Act of 1944, 38 U. S. C., Supp. IV, 693h, is, by the terms of that provision, barred after fifteen years.

see 233 Iowa at 738–739), and in express disregard of what respondent's status might be as a matter of federal law. See 233 Iowa at 734, quoted *supra*, p. 4.

It is respondent's dissatisfaction with the Iowa court's interpretation of Iowa law which has occasioned the present proceeding. But the certificate issued to respondent in 1919 showed on its face that it was what it purported to be, a "Discharge from Draft" and not an "Honorable Discharge from the United States Army." If, as he now contends, the issuance of the certificate he received was in violation of existing regulations, it must follow that he was chargeable in 1918–1919 with the distinction between what he received and what he now contends was required by those regulations.[11] Certainly the distinction was created neither by the Iowa Supreme Court in 1943 nor by the Attorney General of Iowa in 1922. We submit, therefore, that there is no support whatever for the statement of the court below that until the Iowa decision respondent "had no basis for supposing that there was any doubt concerning his status as an honorably discharged soldier" (R. 28).

5. The decision below constitutes a serious and unwarranted invasion of the legitimate field of executive discretion, and a grave interference with orderly administration of the Army.

[11] We are advised that respondent is a practising attorney, that he was admitted to the Iowa bar in 1907, and that he became a member of the bar of this Court on October 11, 1910.

We are advised by the War Department that approximately 56,000 individuals received Discharges from Draft by reason of the President's order directing cancellation of all draft calls on November 11, 1918, and that according to the Department's actuarial records about 47,000 of those individuals are alive today. If the decision below remains undisturbed, the War Department would be bound to release 56,000 certificates upon demand by those now holding Discharges from Draft or by the next of kin of deceased holders of such discharges.

Moreover, the decision below places in an anomalous and inequitable position those who proceeded further in the induction process, but were finally rejected at mobilization camps and there received Discharges from Draft. We are advised that there were about 224,000 men in that group. The decision below opens wide to them the door to litigation seeking equal treatment with others who were discharged from the draft. Thus The Adjutant General would be subjected to a potential demand for the issuance of over a quarter of a million certificates of Honorable Discharge. His office estimates that each such demand would require at least two hours for a search of the records and the preparation and mailing of a certificate, or, in the aggregate, the full time of 280 clerks for one year simply to perform the routine administrative duties involved.

Finally, the decision below would place substantial financial burdens on both the United States and many of the States.[12] We do not believe that such administrative and financial burdens should be assumed in the absence of a review by this Court of the ruling below.

CONCLUSION

For the reasons stated, this petition for a writ of certiorari should be granted.

Respectfully submitted.

J. HOWARD MCGRATH,
Solicitor General.

JUNE 1946.

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[12] (a) Under Paragraph 8, Army Regulations 30–1840, dated October 9, 1944, only those holding honorable discharges are entitled to burial free of cost in national cemeteries. This privilege is denied holders of certificates of discharge from draft. The decision below creates potential liability in this respect as to all of the 280,000 recipients of certificates of discharge from draft still living, and might involve the question of reburial of those deceased.

(b) Under the provisions of Sec. 1406 of the Revenue Act of 1918, c. 18, 40 Stat. 1057, 1151, each person separated from the service by an honorable discharge was entitled to a bonus of $60, regardless of his actual length of service. Those discharged from draft were not eligible for this discharge bonus. Although the average service of all such dischargees was only about 5 days, the decision below would create a potential liability in this respect amounting to $16,800,000.

(c) The statutes of many states extend tax exemptions, bonus payments and other benefits to those honorably discharged, but not to those holding certificates of discharge from draft. The decision below would, by enlarging the number of eligibles, greatly increase the impact of such benefits on state fiscal structures.

APPENDIX

1. The 108th Article of War, as enacted by the Act of August 29, 1916, c. 418, 39 Stat. 619, 668, is as follows:

> ART. 108: Soldiers—Separations from the Service—No enlisted man, lawfully inducted into the military service of the United States, shall be discharged from said service without a certificate of discharge, signed by a field officer of the regiment or other organization to which the enlisted man belongs or by the commanding officer when no such field officer is present; and no enlisted man shall be discharged from said service before his term of service has expired, except by order of the President, the Secretary of War, the commanding officer of a department, or by sentence of a general court martial.

2. Paragraph 150 of the Army Regulations of 1913, corrected to April 15, 1917, was as follows:

> 150. Blank forms for discharge and final statements will be furnished by the Adjutant General's Department and will be retained in the personal custody of company commanders. Discharge certificates will be used in the discharge of enlisted men and for no other purpose, and will be of three classes: For honorable discharge, for discharge, and for dishonorable discharge.
>
> They will be used as follows:
>
> 1. The blank for honorable discharge, when the soldier's conduct has been such as

to warrant his reenlistment and his service has been honest and faithful.

2. The blank for dishonorable discharge, for dishonorable discharge by sentence of a court martial or a military commission.

3. The blank for discharge when the soldier is discharged except as specified under sections 1 and 2 of this paragraph (C. A. R. Nos. 14 and 34).

3. War Department Circular No. 651, dated January 12, 1918, reads in pertinent part as follows:

PREPARATION AND DISPOSITION OF THE INITIAL RECORDS OF MEN INDUCTED INTO THE NATIONAL ARMY

* * * * *

3. *Records of rejected men:*

The following individual records of enlisted men rejected for military service at place of mobilization, will be forwarded to the Adjutant General of the Army, as soon as practicable.

(a) Report of Physical Examination, Form No. 1010 P. M. G. O.

(b) *A true copy* of the certificate of discharge from draft, Form No. 638, A. G. O.

4. *Disposition of rejected men:*

All men rejected for military service at place of mobilization will be furnished the following:

(a) A discharge from draft on Form No. 638, A. G. O.

(b) Final statements. (The rejected man is entitled to pay from date of reporting for military duty to date of discharge, less pay for any time absent without leave, or absent in desertion, or any amount due United States for reward paid for apprehension and delivery of deserter, etc.,

and to travel allowances at the rate of 3½ cents per mile from place of discharge to place of reporting for military duty.

* * * * *

By order of the Secretary of War:

JOHN BIDDLE,
Major General, Acting Chief of Staff.

4. The text of War Department Circular No. 111, dated December 4, 1918, is as follows:

DISCHARGE FROM THE DRAFT UNDER THE PRESIDENT'S ORDER OF NOVEMBER 11, 1918

1. Under the President's order of November 11, 1918, all registrants inducted by Local Boards, but who had not arrived at a mobilization camp or station were ordered discharged.

2. In order that all records of such men may be properly completed, the following instructions will be complied with:

a. The following are the forms and records prepared by Local Boards and forwarded to the commanders of the Mobilization camps or stations concerned, for the discharge of the men designated in paragraph 1:

(1) Double Post Card, Form No. 1029, A and B, P. M. G. O., Original, no copies.

(2) Final Statement of Accounts, Form No. 2017, P. M. G. O., Original and two (2) copies.

(3) Physical Examination, Form No. 1010, P. M. G. O., Original and one (1) copy.

(4) Registration Card, Form No. 1, P. M. G. O., One (1) Form.

b. Immediately upon receipt of these records by the camp commanders concerned,

the procedure indicated below will be followed:

(1) Form No. 1029 A and B will be completed as a rejection "Account Cancellation of Call under President's order of November 11, 1918," and forwarded to the appropriate local Board and the Provost Marshal General in the usual manner.

(2) The Original of Form No. 1010, P. M. G. O., and Form No. 2017, P. M. G. O., will be forwarded with Form No. 1, P. M. G. O., to the Adjutant General of the Army.

(3) A copy of Form No. 1010, P. M. G. O., will be transmitted to the camp surgeon.

(4) A discharge certificate, on a new blank form (Form No. 638–1, A. G. O.), will be made out by the camp commander and transmitted with the two remaining Forms Nos. 2017, P. M. G. O., to the disbursing quartermaster at the camp or station.

(5) The disbursing officer will use the two copies of Form No. 2017, P. M. G. O., as a statement of final account of the man concerned and will issue a check in settlement thereof in the same manner as in the settlement of final statements.

(6) The discharge certificate will be indorsed by the disbursing officer as to final settlement and will then be mailed, with check for amount due, to the man concerned at the address given.

(324.71, A. G. O.)

BY ORDER OF THE SECRETARY OF WAR:

PEYTON C. MARCH,
General, Chief of Staff.

OFFICIAL:

P. C. HARRIS,
The Adjutant General.

5. Following is the front of Form 638, A. G. O., edition of March 16, 1918:

DISCHARGE FROM DRAFT

[Seal]

TO ALL WHOM IT MAY CONCERN

This is to Certify, That_____ _____ is hereby DISCHARGED from the military service of the UNITED STATES by reason of_____ _____ _____

Said _____ was inducted into the service from the jurisdiction of the *Local Board for_____ _____, *Adjutant General, State of_____, on the _____ day of _____, 191 .

While this certificate discharges the person named herein from his present obligation to serve in the Army, it does not operate as a permanent bar to his subsequent entrance into the military service. Under Section 5 of the Act of May 18, 1917, all registered persons remain subject to the draft unless exempted or excused as in that Act provided. Therefore, this discharge does not excuse the holder from obedience to the process of Exemption Boards.

Given at_____, this _____ day of _____, 191 .

By *{command / order} of _____ _____

Adjutant.

*Strike out words not applicable.

NOTE.—This form will be used for discharge of aliens and alien enemies and of men rejected on account of physical unfitness, dependency, etc.

Form No. 638, A. G. O.
Ed. Mar. 6-18-100,000.

6. The form of an Honorable Discharge from the Army, in force at the end of 1918, was as follows:

HONORABLE DISCHARGE FROM THE UNITED STATES ARMY

[Seal]

TO ALL WHOM IT MAY CONCERN:

This is to Certify, That*_____
†_____
THE UNITED STATES ARMY, as a Testimonial of Honest and Faithful Service, is hereby Honorably Discharged from the military service of the United States by reason of ‡_____

Said _____ was born in _____, in the State of_____ When enlisted he was _____ years of age and by occupation a _____ He had _____ eyes, _____ hair, _____ complexion, and was _____ feet _____ inches in height.

Given under my hand at _____ this _____ day of _____, one thousand nine hundred and _____.

_____
_____
Commanding.

Form No. 525, A. G. O.
Oct. 9–18

*Insert name, Christian name first: e. g., "John Doe."

†Insert Army serial number, grade, company and regiment or arm or corps or department: e. g., "1,620,302"; "Corporal, Company A, 1st Infantry"; "Sergeant, Quartermaster Corps"; "Sergeant, First Class, Medical Department."

‡If discharged prior to expiration of service, give number, date, and source of order or full description of authority therefor.

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DEC 27 1946

No. 229

In the Supreme Court of the United States

OCTOBER TERM, 1946

ROBERT P. PATTERSON, SECRETARY OF WAR, AND EDWARD F. WITSELL, THE ADJUTANT GENERAL, UNITED STATES ARMY, PETITIONERS

v.

JAMES JOHN LAMB

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE PETITIONERS

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In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 229

ROBERT P. PATTERSON, SECRETARY OF WAR, AND EDWARD F. WITSELL, THE ADJUTANT GENERAL, UNITED STATES ARMY, PETITIONERS

v.

JAMES JOHN LAMB

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE PETITIONERS

OPINION BELOW

The District Court of the United States for the District of Columbia did not render an opinion. The opinion of the United States Court of Appeals for the District of Columbia (R. 22–29) is reported at 154 F. 2d 319.

JURISDICTION

The judgment of the Court of Appeals was entered on March 25, 1946 (R. 29). The petition for a writ of certiorari was filed on June 24,

1946, and was granted October 14, 1946 (R. 33). The jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether a court may, by mandamus, order the Secretary of War to issue an "Honorable Discharge from the Army" to an individual who received a "Discharge from Draft" in 1918, over 25 years prior to the institution of suit, where such individual simply reported for induction on November 11, 1918, returned to his home on that day because of the cancellation of all draft calls by order of the President, never entrained for travel to a military camp, never wore the uniform, and never was accepted for military service by the Army.

STATUTES AND REGULATIONS INVOLVED

The pertinent portions of the statutes, Army Regulations and discharge certificates involved, are set forth in the Appendix, *infra*, pp. 58–75.

STATEMENT

The facts in this case, which are not in dispute, are taken from respondent's amended complaint and from the opinion of the Supreme Court of Iowa cited in paragraph 18 of that complaint.

Pursuant to the provisions of Section 2 of the Selective Draft Act of 1917 (c. 15, 40 Stat. 76, 77–78) and regulations promulgated thereunder,

respondent James John Lamb was ordered by the local draft board at Davenport, Iowa, to report for military duty at 9:00 A. M. on November 11, 1918 (R. 2–3). The order recited that "From and after the day and hour just named you will be a soldier in the military service of the United States" (R. 13). He reported at the time and place fixed in the order and was appointed leader of a contingent of drafted men who were to travel to Camp Dodge (R. 3–4). Thereafter, "the entire contingent went to the Hotel Dempsey, in Davenport, for lunch before entraining for Camp Dodge in Des Moines.[1] While at lunch, a board member arrived and told them they would not entrain for Camp Dodge because 'calls had been cancelled.' He also stated that members of the contingent were dismissed and that written notice of the cancellation would be mailed to each of them." (*Lamb* v. *Kroeger*, 233 Iowa 730, 732; R. 4–5.)

The cancellation of draft calls had been made by order of the Provost Marshal General under instructions of the President, the contents of the order being communicated to all State draft executives by telegram on November 11, 1918 (R. 16). This telegram stated, in part (R. 16), that

[1] It was customary, during the First World War, to arrange more or less elaborate civic celebrations to honor the men selected for service on the occasion of their departure for camp. *Second Report of the Provost Marshal General to the Secretary of War on the Operations of the Selective Service System to December 20, 1918* (1919) 237–238.

> The issue of formal papers of discharge will be considered and determined later, at which time claims for adjustment of pay and allowances for the men so inducted and so discharged will be passed upon.

On November 15, 1918, respondent was notified in writing by his local board of the cancellation order and was advised that "such cancellation in cases of registrants who were inducted has the effect of an honorable discharge from the army" (R. 5, 15). On January 26, 1919, respondent received a certificate entitled "Discharge From Draft", dated November 14, 1918, on Form 638–1, A. G. O. (R. 5–6, 17).[2]

For a number of years prior to 1941, respondent claimed and received under the tax statutes of Iowa a $500 exemption, applicable to the property of "any honorably discharged soldier." In 1941, the State authorities denied him the exemption, a denial which was upheld by the Iowa Supreme Court. *Lamb* v. *Kroeger*, 233 Iowa 730, decided March 9, 1943, rehearing denied, June 18, 1943. (R. 7–9.) The court relied in part on an opinion of the Attorney General of Iowa, rendered in 1922 (1922 A. G. O. 194), to the effect that persons holding Discharges from Draft were not within

[2] We point out below, pp. 18–22, that Form 638–1 was adapted from Form 638 (Appendix, *infra*, pp. 68–71), which was used for the discharge of men rejected at the mobilization camps for various reasons. The use of Form 638 was authorized by War Department Circular No. 651 of January 12, 1918 (Appendix, *infra*, pp. 62–66).

the exemption statute, but decided the case purely as a matter of state law, saying (233 Iowa at 734): "We are here concerned with what the Iowa Legislature, not draft-law administrators, or United States Government officials, meant by the term 'honorably discharged soldier * * * of the war with Germany.'"

Thereafter, respondent applied to The Adjutant General, United States Army, for a certificate of Honorable Discharge, and, upon denial of the application, brought this suit in the District Court of the United States for the District of Columbia against the then Secretary of War and the then Adjutant General,[2] seeking a declaratory judgment that respondent was entitled to a certificate of Honorable Discharge, and seeking also a mandatory injunction directing the petitioners to issue such a certificate. The case was heard on an amended complaint (R. 2–19)—filed on October 28, 1944, nearly 26 years after respondent's release from military service—and a motion to dismiss (R. 19–20). The motion was sustained by the district court, which ordered the complaint dismissed (R. 20).

On appeal, the court below reversed, holding that respondent was entitled to an Honorable Discharge by virtue of Paragraph 150 of the Army Regulations then in force (R. 25–26; Appendix

[2] The present petitioners, successors in office, were duly substituted in the court below (R. 30).

infra, pp. 61–62). The court held that Discharges from Draft issued under Circular No. 651 of January 12, 1918 (*infra*, pp. 62–66), were appropriate only for men rejected at the mobilization rendezvous;[*] that Form 638–1, discharging men by reason of the President's order of November 11, 1918, suspending further draft calls, was first "officially authorized" by Circular No. 111 of December 4, 1918 (Appendix, *infra*, pp. 66–68); and that that Circular could not be applied to a separation which occurred before its effective date (R. 26–27). The court refused to hold that respondent had been guilty of laches, saying that until the decision of the Iowa Supreme Court he "had no basis for supposing that there was any doubt concerning his status as an honorably discharged soldier" (R. 28).

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals erred:

1. In holding that the amended complaint stated a claim upon which relief could be granted.

2. In holding that an action seeking a mandatory injunction could be maintained against petitioners in the instant case.

3. In holding that respondent was entitled to a certificate of "Honorable Discharge from the United States Army."

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[*] Under Selective Service Regulations (1917–19) Nos. 174–177, draftees were not finally accepted or rejected for military service until after examination at the mobilization camp.

4. In holding that the certificate of "Discharge from Draft" issued to respondent was not authorized by law.

5. In holding that it could interfere with the Secretary of War and the Adjutant General of the Army in a matter relating to the internal administration of the military service.

6. In failing to hold that respondent was barred by his laches from maintaining the instant suit.

7. In reversing the District Court.

SUMMARY OF ARGUMENT

I. A. The only statutory provision governing discharges in force at the date of the respondent's discharge was the 108th Article of War, which by its terms granted the enlisted man only the right to a certificate of discharge, not to any particular kind of discharge. Accordingly, it has been uniformly held that a person discharged from the military service cannot, if dissatisfied with the type of certificate issued him, resort to the courts for relief, regardless of the nature of the remedy sought. New legislation was required when Congress in 1944 intended to provide for review of the discharges issued to veterans of World War II.

B. Paragraph 150 of the 1913 Army Regulations governed the discharge, in 1918, of men who were in the Army. Under the 1917 draft law, men were inducted and became subject to military law when they were ordered to report; but they were not accepted or rejected by the

Army until they reached the mobilization camps. Men rejected by the Army were not within the purview of par. 150, not being in the Army; instead, they received Discharges from Draft. When all outstanding draft calls were cancelled because of the Armistice, the men inducted but not yet accepted were analogized to the men rejected rather than to those accepted. The line was drawn between men in, and men not in, the Army. The form of Discharge from Draft could have been used for the men in respondent's position; Form 638–1 shows on its face that it did not depend for its validity on Circular No. 111 of December 4, 1918.

C. Even if the case of the men not accepted by the Army because of the cancellation of draft calls was not covered by the regulations in force on November 11, 1918, the Secretary was not shackled by his own regulations; he was free to deal with unforeseen contingencies as they arose. *Denby* v. *Berry*, 263 U. S. 29, 38. The Armistice came at a time when the expanding military program necessitated increased draft calls. Respondent is not entitled, by reason of the Army's failure to divine the future, to be placed on a parity with those who were accepted by the Army and actually served, and in a more advantageous position than those who proceeded to camp and were there rejected by the Army.

D. The distinction between a Discharge from

Draft and an Honorable Discharge was recognized by Congress in 1924, when it denied the holder of the former any right to adjusted compensation (38 U. S. C. 602 (i)), but awarded him rights to disability compensation and insurance (38 U. S. C. 448). This recognition may well amount to ratification; in any event, it underscores the soundness of petitioners' refusal to issue an Honorable Discharge in the present circumstances.

II. A, B. Discharges from the armed forces have always been held to be discretionary with the military and naval establishments, so much so that the form or type of a discharge will not be reviewed by the courts even in the event of noncompliance with a regulation. That being so, there is brought into play the firmly settled rule that decisions of administrative officers, where they involve an exercise of discretion, and insofar as they are neither unreasonable nor plainly wrong, will not be set aside by process in the nature of mandamus. Here the Secretary of War did not have in 1918–19 a plain ministerial duty, equivalent to a positive command, to issue a discharge from the Army to a man who had never been accepted by the Army. *A fortiori,* the present petitioners do not have a plain ministerial duty, equivalent to a positive command, to issue to respondent at this time a form of discharge different from that given him in 1919, and which

neither he nor any of the thousands similarly situated had ever questioned in the intervening years.

C. The rule that discretionary action on the part of executive officers acting within the scope of their statutory authority will not be controlled by the courts has particular force as applied to the military establishment; and this Court has repeatedly refused to sanction judicial intrusion into the realm of ordinary military and naval administration. *Reaves* v. *Ainsworth*, 219 U. S. 296; *French* v. *Weeks*, 259 U. S. 326; *Creary* v. *Weeks*, 259 U. S. 336; *Denby* v. *Berry*, 263 U. S. 29.

D. The foregoing standards of review, as to discretionary matters generally, and as to military and naval administration specifically, were not modified by anything contained in the Administrative Procedure Act. To begin with, its provisions as to judicial review, which became effective over two months after the petition for certiorari had been filed in this case, are not applicable to pending cases; nothing in the statute or its legislative history reflects any purpose to alter the scope of judicial review where the proceedings in review have entered upon the ultimate appellate stage. Moreover, and in any event, both the language and the legislative history of the Administrative Procedure Act show a clear intent to preserve the existing scope of judicial review. The debates are devoid of any suggestion that the rule with reference to the function of mandamus

was even under consideration. Strong and apt language would be necessary to overturn a doctrine so firmly settled, particularly in its application to the field of routine military administration. The Act evidences no such purpose.

E. The circumstance that a Discharge from Draft has been treated by Congress and some state courts as being equivalent, in some situations, to an Honorable Discharge, does not support the view that the Secretary of War can be compelled to issue the latter to a man who received only the former. Indeed, the recognition by Congress of the Discharge from Draft, with a limitation on the benefits such a discharge was to carry, supports the position of petitioners here.

III. In any event, respondent's claim is now barred by laches; after more than a quarter of a century it is obviously a stale demand. The doctrine of laches applies to actions for mandamus, which have been held barred by much shorter delays. Cf. *Arant* v. *Lane*, 249 U. S. 367. The decision of the Iowa court rejecting respondent's claim for a tax exemption disclosed no fact hitherto unknown. If respondent was wronged by the receipt in 1919 of a Discharge from Draft on the ground now asserted, viz., that its issuance was in violation of controlling regulations, he was chargeable then with the distinction between what he received and what now he contends was required. Certainly the

distinction was created neither by the Iowa court in 1943 nor by Congress when in 1924 it attached substantive consequences to the distinction. Moreover, the far-reaching unsettling of military and fiscal administration which would follow acceptance of respondent's contentions after so long a period of time makes applicable the rule than mandamus will not issue to direct an act which will work a public mischief. *Duncan Townsite Co.* v. *Lane*, 245 U. S. 308, 311.

ARGUMENT

I

RESPONDENT'S CERTIFICATE OF DISCHARGE FROM DRAFT WAS ISSUED PURSUANT TO THE DISCRETION VESTED BY LAW IN THE SECRETARY OF WAR

A. THE ONLY STATUTORY PROVISION GOVERNING THE MATTER GIVES THE PERSON DISCHARGED FROM THE MILITARY SERVICE ONLY A RIGHT TO A CERTIFICATE OF DISCHARGE, NOT TO ANY PARTICULAR FORM OF DISCHARGE

The only statutory provision in force governing discharges at the date of Lamb's discharge was the 108th Article of War of the 1916 Code (Act of August 29, 1916, c. 418, 39 Stat. 619, 668; Appendix, *infra*, p. 58), which provided as follows:

> ART. 108. SOLDIERS—SEPARATION FROM THE SERVICE.—No enlisted man, lawfully inducted into the military service of the United States, shall be discharged from

> said service without a certificate of discharge, signed by a field officer of the regiment or other organization to which the enlisted man belongs or by the commanding officer when no such field officer is present; and no enlisted man shall be discharged from said service before his term of service has expired, except by order of the President, the Secretary of War, the commanding officer of a department, or by sentence of a general court martial.

This provision did not prescribe the form, terms, or type of certificate, leaving these matters to the unfettered discretion of the civil heads of the military establishment; by its terms it granted the enlisted man only the right to a certificate of discharge, not to any particular kind of discharge.

The court below, prior to its decision in the present case, had applied the well-settled principle, deduced from the 108th Article of War of 1916 and its statutory predecessors,[5] that since the individual discharged from the military service was not entitled by law to any particular form of discharge, he could not, if dissatisfied with the

[5] Similar provisions appeared in earlier military codes. See AW 4 of the Code of 1874 (R. S. 1342); AW 11 of the Code of 1806 (Act of April 10, 1806, c. 20, 2 Stat. 359, 361); AW 13 of the Code of 1786 (Res. of May 31, 1786, 30 J. Cont. Cong. 316, 319), continued in force under the Constitution by Sec. 4 of the Act of Sept. 29, 1789, c. 25, 1 Stat. 95, 96.

The present 108th Article of War (Act of June 4, 1920, c. 227, 41 Stat. 759, 809; 10 U. S. C. 1580) is identical with the same article of the 1916 Code.

type of certificate issued him, resort to the courts for relief (*Davis* v. *Woodring*, 111 F. 2d 523 (App. D. C.)); and the rule was the same whether he sought a writ of mandamus against the Secretary (*Davis* v. *Woodring*, *supra*) or whether he sued for back pay claimed to be due him (*Reid* v. *United States*, 161 Fed. 469 (S. D. N. Y., *per* Hough, D. J.), writ of error dismissed for want of jurisdiction, 211 U. S. 529; *Palmer* v. *United States*, 72 C. Cls. 401), even when he could establish a noncompliance with governing regulations (*Palmer* v. *United States*, *supra*). The Secretary could not be required to revoke a discharge or an order of separation from the service (*Denby* v. *Berry*, 263 U. S. 29; *Nordmann* v. *Woodring*, 28 F. Supp. 573, 575 (W. D. Okla.), nor his subordinates to issue one (*Miller* v. *Commanding Officer*, 57 F. Supp. 884 (N. D. Tex.)). Indeed, the law on this point had been deemed so firmly established—certainly so far as the Army and Navy were concerned[6]—that new legislation was required when Congress desired to provide for review of the discharges issued to veterans of World War II. Section 301, Servicemen's Read-

[6] Compare *Hurley* v. *Crawley*, 50 F. 2d 1010 (App. D. C.). If this case is still law since *Davis* v. *Woodring*, 111 F. 2d 523, *supra*, it must be because there the issue was as to the effect to be accorded plaintiff's Discharge from Draft in relation to his civil service preference, and did not involve an attempt to obtain a different kind of discharge from the military authorities. See pp. 46–49, *infra*.

justment Act of 1944, Act of June 22, 1944, c. 268, 58 Stat. 284, 286–287, 38 U. S. C., Supp. V, 693h.[7]

B. THE DISCHARGE FROM DRAFT GIVEN RESPONDENT HERE WAS AUTHORIZED BY THE REGULATIONS IN FORCE AT THE TIME OF ITS ISSUANCE.

The court below assumed (R. 25–27) that the discharge issued by respondent was not authorized by the regulations in force at the date of his discharge. Examination of those regulations discloses the unsoundness of the assumption.

When World War I began, the types of discharges to be given on the soldier's separation from the Army were prescribed by Paragraph 150 of the Army Regulations of 1913 (as corrected to April 15, 1917).[8] This paragraph was as follows:

[7] See the remarks of Mr. McCormack discussing Section 301 in the House (90 Cong. Rec. 4538): "We felt that some machinery should exist in the Navy Department and the War Department whereby veterans could have a review without the necessity of having their discharges corrected by specific acts of Congress."

See also Sec. 131 of the Legislative Reorganization Act of 1946 (Pub. Law 601, 79th Cong., 2d sess.), prohibiting the consideration of any bill authorizing or directing "the correction of a military or naval record," and Sec. 207 of the same bill, authorizing the heads of the departments involved to establish civilian boards for this purpose.

[8] Congress conferred express authority for the issuance of regulations for the government of the Army by the Act of March 1, 1875, c. 115, 18 Stat. 337, 10 U. S. C. 16, though doubtless the President always had such power by virtue of being the Commander-in-Chief. *United States* v. *Eliason*, 16 Pet. 291, 301; *United States* v. *Freeman*, 3 How. 556, 567; *Gratiot* v. *United States*, 4 How. 80, 118; *Kurtz* v. *Moffitt*, 115 U. S. 487, 503; see Lieber, *Remarks on the Army Regu-*

150. Blank forms for discharge and final statements will be furnished by the Adjutant General's Department and will be retained in the personal custody of company commanders. Discharge certificates will be used in the discharge of enlisted men and for no other purpose, and will be of three classes: For honorable discharge, for discharge, and for dishonorable discharge.

They will be used as follows:

1. The blank for honorable discharge, when the soldier's conduct has been such as to warrant his reenlistment and his service has been honest and faithful.

2. The blank for dishonorable discharge, for dishonorable discharge by sentence of a court martial or a military commission.

3. The blank for discharge when the soldier is discharged except as specified under sections 1 and 2 of this paragraph (C. A. R. Nos. 14 and 34).

With the passage of the Selective Draft Act of 1917, induction was added to enlistment as a mode of entering military service, i. e., of effecting the transition from civilian to military status. Numerous questions turned on the determination of the precise time when the person entered the military service and became subject to military law. General Crowder's *Second Report, supra*, p. 3, thus phrased the moment of transition (p. 221):

lations (1898), 48–49, 72–73, 151–184. The court below was in error (R. 25) in resting the Secretary's authority in this regard on R. S. 161, 5 U. S. C. 22, which refers only to the executive departments.

The act of enlistment is effected by the proper officer's acceptance of the applicant and by the applicant's taking the oath of enlistment.

Under the selective service act, no oath was provided for entrance into service by the selective draft. * * * But it was early held, in the administration of the act, that the decisive point of time was the time duly set by the local board (or the State adjutant general) for the registrant to report to the board for military duty, preliminary to entrainment for camp.

* * * * * *

The question of principle involved was a novel one; but the solution thus early adopted by this office was a logical consequence of the second article of war,[9] and it was fully and consistently confined by the opinions of the Federal courts[10] * * *.

---

[9] Of 1916 (39 Stat. at 651): "The following persons are subject to these articles and shall be understood as included in the term 'any person subject to military law' * * *

"(a) * * * persons lawfully called, drafted or ordered into, or to duty or for training in, the said [military] service [of the United States], from the dates they are required by the terms of the call, draft or order to obey the same; * * *"

[10] Citing *Franke* v. *Murray*, 248 Fed. 865 (C. C. A. 8). *Accord: Ex parte Bergdoll*, 274 Fed. 458 (D. Kan.); *United States ex rel. Feld* v. *Bullard*, 290 Fed. 704 (C. C. A. 2), certiorari denied, 262 U. S. 760; *United States* v. *McIntyre*, 4 F. 2d 823 (C. C. A. 9); *United States ex rel. Bergdoll* v. *Drum*, 107 F. 2d 897 (C. C. A. 3), certiorari denied, 310 U. S. 648.

> At the day and hour specified for reporting for duty, the local board formed the men in single rank, called the roll, appointed the party leader and the squad leaders, and read a short address, instructing them in the preparations to be made, and declaring them to be now "in the military service of the United States." This was the moment of induction. They were then dismissed until the second roll call, prior to entrainment.[11]

However, although inducted into the military service and subject to military law, the selected men of 1917–1918 were not actually in the Army until they had been accepted by the Army at the mobilization camps. See Selective Service Regulations (1917–19), Nos. 174–177. Many were rejected for physical disqualifications, others because they were aliens or enemy aliens, still others for dependency or other reason for deferred classifications.

Discharges for men in the Army continued to be governed by par. 150, A. R. 1913. For men inducted but thereafter rejected by the Army, another procedure was devised. As early as January 12, 1918, the War Department by Circular No. 651 (Appendix, *infra*, pp. 62–66) had provided

[11] Under the Selective Training and Service Act of 1940, however, selectees were not subject to military law until they had been accepted by the Army and had taken the oath. See *Billings v. Truesdell*, 321 U. S. 542.

that as to such men, rejected on any one of several grounds—and the Circular did not purport to restrict the grounds or reasons for which a given individual might be rejected—would not be given an Honorable Discharge, but would be issued a Discharge from Draft on Form No. 638, A. G. O. (Appendix, *infra*, pp. 68–71), together with pay until date of discharge.

The several discharge certificates were appropriately worded to reflect both the military status of the discharged person as well as the reasons for his separation.

The "Honorable Discharge from The United States Army" (Appendix, *infra*, pp. 72–73; A. R. 150, par. 1) recited that the individual—giving his name, grade, and organization, "United States Army"—,

> as a Testimonial of Honest and Faithful Service, is hereby Honorably Discharged from the military service of the United States by reason of * * *

If such discharge was by reason of expiration of term of service, that fact was entered on the certificate; and a note thereon directed that "If discharged prior to expiration of service, give number, date, and source of order or full description of authority therefor."

The blue "Discharge from The United States Army" (Appendix, *infra*, pp. 74–75; A. R. 150, par. 3) recited that the individual—giving his

name, grade, and organization, "United States Army"—

> is hereby Discharged from the military service of the United States by reason of * * *

The note at the foot of the blue discharge directed, "State fully actual cause of discharge, giving number, date, and source of order or full description of authority therefor."

The "Discharge from Draft" on Form No. 638, A. G. O. (Appendix, *infra*, pp. 68–71) recited that the individual—without more—

> is hereby Discharged from the military service of the United States by reason of * * *

The note on the Discharge from Draft stated that "This form will be used for discharge of aliens and alien enemies and of men rejected on account of physical unfitness, dependency, etc."

In other words, if a man had been accepted by the Army, he was described as a member of the Army by grade and organization and discharged from the Army, while if he had been rejected by the Army, he was simply discharged from the draft as an individual—even though prior to rejection he may have worn the uniform and performed the duties of a soldier, as in *Davis v. Woodring*, 111 F. 2d 523 (App. D. C.). Obviously he could not be described as a member of the Army, with serial number, grade, and organization, when the Army

had never accepted him. The very form of an Honorable Discharge emphasizes its inappropriateness for a person in respondent's situation.[12]

It is significant in this connection that, after October 1, 1918, induction into the military service did not automatically direct the selected man towards the Army. After that date, men were also inducted for duty in the Navy and the Marine Corps. See *Second Report of the Provost Marshal General,* p. 226; *Final Report of the Provost Marshal General* [corrected edition], p. 54. This circumstance emphasizes the necessity for distinguishing between induction into military service and acceptance by the Army.

When all outstanding draft calls were cancelled on the day the Armistice was signed, the military authorities, as we have pointed out (*supra,* p. 4), did not immediately determine what form of discharge to issue to the man *in transitu,* so to speak, who had been inducted but whom the Army had not accepted and did not accept. True, these men were not rejected by the Army, but most assuredly, they were never in the Army. Conse-

[12] The idea of a "Discharge from Draft" may have been derived from Section 16 of the Civil War Draft Act of March 3, 1863, c. 75, 12 Stat. 731, 734: "That as soon as the required number of able-bodied men liable to do military duty shall be obtained from the list of those drafted, the remainder shall be discharged; * * *." *Held,* not a discharge from the military service, but only a release from liability to service. Dig. Op. JAG (1912), pp. 623-624, par. 11 C.

quently, any discharge "from the Army" under par. 150, A. R. 1913, would have been inappropriate. They were accordingly issued the Discharge from Draft, and in his final report General Crowder classified the 55,855 men in this category as "rejected, cancellation of draft." *Final Report of the Provost Marshal General to the Secretary of War* (1920) 54, 55–120.

It is to be noted that Form No. 638, A. G. O., could have been used without change for the discharge of men not accepted because of the Armistice and the attendant cancellation of draft calls. And as a matter of fact, all that Form 638–1 did was to print the reason for discharge, viz., "by order of the President, dated November 11, 1918," which previously was required to be specially inserted in each instance.

The court below concluded (R. 26) that Form 638–1 depended for its validity on Circular No. 111 of December 4, 1918. But this was clearly erroneous, as the very face of the Discharge from Draft actually issued respondent (R. 17) shows that it was devised on "Nov. 19–18." All that Circular No. 111 did was to bring the change generally to the attention of the service; it did not signalize any departure from preexisting practice.

And the court below was also in error in assuming (R. 27) that par. 150 of the 1913 Army Regulations governed respondent's case. This no-

tion, that a man not accepted by the Army and never in the Army could still claim the benefit of regulations prescribing modes of separation from the Army, is the all-permeating substantive misconception of the ruling now under review.

C. IN ANY EVENT, THE SECRETARY OF WAR WAS NOT BOUND BY HIS OWN REGULATIONS SO THAT, WHEN THE ARMISTICE INTERVENED, HE WAS OBLIGED TO ISSUE AN HONORABLE DISCHARGE FROM THE ARMY TO A MAN WHO HAD NEVER BEEN IN THE ARMY

Even if we should be wrong in our view that the regulations in force on November 11, 1918, required respondent to be issued a Discharge from Draft rather than an Honorable Discharge from the Army, it still does not follow that he is entitled to prevail. For even on this assumption, the court below was still in error; it held that the Secretary of War was so far bound by his own regulations that, not having anticipated the Armistice nor the circumstances that the cessation of hostilities with Germany would result in a suspension of draft calls, he was bound to issue an Honorable Discharge from the Army to a man who had never been accepted by the Army, who had never entrained for the mobilization rendezvous, and who is careful not to allege that he even proceeded as far as the railroad station (R. 4–5).

But the law does not require the Secretary of War to have second sight. A regulation cannot "be made the basis of a proceeding in mandamus

against the Secretary. It governs his subordinates only and may be ignored by him." *Denby* v. *Berry*, 263 U. S. 29, 38; *Reid* v. *United States*, 161 Fed. 469, 472, *supra*; *Smith* v. *United States*, 24 C. Cls. 209. The Secretary of War is always free to deal with contingencies up to then unprovided for, as these may arise.

The Armistice in 1918 came unexpectedly at a time when the nation was embarking on an expanding and accelerated military program.[13] All energies were directed to mobilization. The regulations had not been drawn in contemplation of a sudden Armistice which coincided with an unusually large increase in the number of draft calls.[14] Accordingly, even if a narrow reading of the regulations would support respondent's view, he can not insist that the Secretary apply them to the

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[13] "It seems to me appropriate here to observe that the termination of the war in 1918 was to a certain extent unexpected. When I visited France in October, 1918, plans for the campaign of 1919 were still under earnest consideration. The American 80-division program was, of course, addressed to that campaign. Marshal Foch expressed confident belief in his ability to win the war in 1919, with the aid of 80 American divisions. The plans in this country, as well as those in Europe, were all made in anticipation of operations on a tremendous scale beginning in the spring of 1919.

"We had failed to realize the effect of our accelerated troop movement, both in demoralizing the enemy and in strengthening the fighting efficiency of the allied armies on the western front. * * *" *Report of the Secretary of War for the Fiscal Year 1919*, H. Doc. 426, 66th Cong., 2d sess., p. 12.

[14] "Meanwhile the prevalence of the epidemic had likewise made it necessary to suspend calls to camp. When this

present situation which was obviously not contemplated by them.

Respondent in effect claims a vested right to profit by that oversight. He contends that since no one, the Secretary of War least of all, anticipated the Armistice, that circumstance gives him a vested right to an Honorable Discharge from the Army. Otherwise stated, respondent insists that because the military authorities failed accurately to divine the future, he is entitled as a matter of law to be placed on a parity with those who were accepted by the Army and actually served, and in a more advantageous position than those who proceeded to the mobilization camp and were there rejected by the Army.

As we have shown, the Secretary of War was not straitjacketed by his own regulations. *Denby* v. *Berry*, 263 U. S. 29, 38. He had the power to make provision for the 56,000 odd men in respondent's position. He could decide, in the exercise of a sound discretion, whether a man inducted

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obstacle had passed away, the date fixed for delivery to camp by entrainment of the men called under the first substantial requisition applicable to the new registrants was Monday, November 11, 1918. On that day were ready for entrainment at their local boards the total of 140,000 men of the new registration, as well as 130,000 more men not yet requisitioned, together with some 110,000 or more of those still available from the first and second registrations. It was on that very day that the armistice was signed * * *" *Second Report of the Provost Marshal General*, p. 177.

into the military service and not accepted by the Army by reason of the cancellation of draft calls should be analogized to a man inducted and then rejected, or to a man inducted and accepted. The decision made was that non-acceptance was closer to rejection than to acceptance, that the line to be drawn was between the men in the Army and the men not in the Army. In other words, men in the Army would be separated under the provisions of par. 150, A. R. 1913, while men not in the Army would receive Discharges from Draft. We submit, therefore, that this decision represented the exercise of a sound discretion.[15]

The circumstance that respondent here was given four days' pay, covering the time from his induction until his discharge (R. 6, 19), does not, of course, establish his right to an Honorable Discharge from the Army; such pay was, under the provisions of par. 4 (b) of Circular No. 651 (*infra*, p. 63), given all men who were inducted and thereafter rejected by the Army. Nor can it be contended that his prayer for a declaratory judgment "that he served as a soldier in the Army" (R. 10) is supported by the circumstance that he

[15] This Court has quoted with approval the ruling of Judge Advocate General Holt that an honorable discharge represents "a formal final judgment passed by the government upon the entire military record of the soldier." *United States* v. *Kelly*, 15 Wall. 34, 36. And see *In re Eong Chew Chung*, 149 F. 2d 904, 906 (C. C. A. 9): "Such a certificate could not rightly be awarded one who had given no service."

was, after induction and prior to discharge, subject to military law. Article of War 2(d) of 1916[16] subjected to military law a good many civilians who never were in the Army,[17] as well as a sizable number of others who went to some pains to stay out of the Army.[18]

D. THE ISSUANCE OF DISCHARGES FROM DRAFT TO MEN WHO WERE INDUCTED BUT NEVER ACCEPTED BY THE ARMY HAS BEEN RECOGNIZED—AND PROBABLY RATIFIED—BY CONGRESSIONAL ENACTMENT

The difference between a Discharge from Draft and an Honorable Discharge from the Army has

[16] "ART. 2. PERSONS SUBJECT TO MILITARY LAW.—The following persons are subject to these articles and shall be understood as included in the term 'any person subject to military law,' * * * whenever used in these articles: * * *

"(d) All retainers to the camp and all persons accompanying or serving with the armies of the United States without the territorial jurisdiction of the United States, and in time of war all such retainers and persons accompanying or serving with the armies of the United States in the field, both within and without the territorial jurisdiction of the United States, though not otherwise subject to these articles; * * *" 39 Stat. at 651.

[17] *Ex parte Falls*, 251 Fed. 415 (D. N. J.) (civilian cook on an army transport); *Ex parte Jochen*, 257 Fed. 200 (S. D. Tex.) (civilian quartermaster superintendent); *Hines* v. *Mikell*, 259 Fed. 28 (C. C. A. 4), certiorari denied, 250 U. S. 645 (civilian auditor employed on construction of cantonment).

[18] E. g., *Ex parte Bergdoll*, 274 Fed. 458 (D. Kan.) (draft deserter); *United States ex rel. Feld* v. *Bullard*, 290 Fed. 704 (C. C. A. 2), certiorari denied, 262 U. S. 760 (same); *United States ex rel. Bergdoll* v. *Drum*, 107 F. 2d 897 (C. C. A. 2), certiorari denied, 310 U. S. 648 (same).

been recognized and acquiesced in by Congress. In the circumstances we venture to suggest that such recognition amounts to a legislative ratification of what was done in the present case.

Section 202 of the World War Adjusted Compensation Act (Act of May 19, 1924, c. 157, 43 Stat. 121, 122–123; 38 U. S. C. 602) provides in part as follows:

> SEC. 202. In computing the adjusted service credit no allowance shall be made to—
>
> * * * * *
>
> (i) Any individual who was discharged or otherwise released from the draft—for the period of service terminating with such discharge or release.

Such legislative history as there is indicates that Section 202 (i) was inserted to cover the cases of those who "really did not render such service as would entitle them to compensation." 65 Cong. Rec. 6712; and see H. Rep. 624, 68th Cong., 1st sess., pp. 1, 4.

But, while the holder of a Discharge from Draft was not entitled to the bonus, he was given the same rights to disability compensation (and, in some instances, to insurance) that were accorded the men who received Honorable Discharges. Section 24 of the World War Veterans' Act, 1924 (Act of June 7, 1924, c. 320, 43 Stat. 607, 614; 38 U. S. C. 448) provides as follows:

> * * * if after induction by the local draft board, or after being called into Federal service as a member of the National Guard, but before being accepted and enrolled for active service, the person died or became disabled as a result of disease contracted or injury suffered in the line of duty and not due to his own willful misconduct involving moral turpitude, or as a result of the aggravation, in the line of duty and not because of his own willful misconduct involving moral turpitude, of an existing disease or injury, he or those entitled thereto shall receive the benefits of compensation payable under Title II; and any insurance application made by such person after induction by the local draft board but before being accepted and enrolled for active service shall be deemed valid.[19]

These provisions certainly amount to a legislative recognition of the propriety of the War Department's differentiation between men who simply reported for induction and men who were accepted by the Army. They may well amount to a ratification of what was done in 1918–1919. Certainly they emphasize the essential soundness of petitioners' refusal (R. 9) to issue an Honorable Discharge from the Army to a man in respondent's position.

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[19] And see Section 25 of the same Act, 38 U. S. C. 449, granting the same benefits to men provisionally accepted for enlistment or enrollment.

II

SINCE THE FORM AND CHARACTER OF DISCHARGES FROM THE MILITARY SERVICE ARE DISCRETIONARY, THESE MATTERS CAN NOT BE CONTROLLED BY MANDATORY INJUNCTION

A. THE TYPE OF A DISCHARGE FROM THE ARMED FORCES HAS ALWAYS BEEN HELD TO BE NOT REVIEWABLE BY THE COURTS

We have already pointed out above, pp. 13–14, that the courts have never undertaken to review the actions of the armed forces in respect of the form and character of discharges issued upon separation from the service, regardless of the nature of the remedy sought or the person against whom relief was requested. As the court below stated in an earlier case (*Davis* v. *Woodring*, 111 F. 2d 523, 525, *supra*):

> * * * Congress having failed to prescribe the form of discharge and having left it to the discretion of the President acting through the Secretary, we are wholly without any effective power of review.

Or, otherwise stated, "The power to discharge * * * is vested in the commanding officer of the Army and an order of discharge emanating from the Secretary of War or the commanding officer of a department is not subject to review by the courts." *Nordmann* v. *Woodring*, 28 F. Supp. 573, 575, *supra*. Relief will not be granted even when there has been a violation

of the applicable regulations; the only inquiry is whether there has been compliance with the statute. *Palmer* v. *United States,* 72 C. Cls. 401.

In that case, Palmer had enlisted in the Coast Guard, but had been discharged by the captain of his ship, before expiration of his enlistment, in violation of the provision of the applicable regulations. He thereupon brought suit for back pay for the unexpired portion of his enlistment, alleging that the discharge was invalid because not effected as provided in the regulations. The Court of Claims denied recovery, saying (72 C. Cls. at 405–406):

> * * * Any regulation that the Secretary [of the Treasury] may have made could be set aside by him at any time and a new and different one promulgated * * *.
>
> * * * * Nothing is expressed in the enlistment papers of plaintiff as to what reasons shall be sufficient for a discharge, nor is there anything that would indicate that he could only be discharged in accordance with certain regulations made by the Treasury Department. If the commanding officer of plaintiff failed to observe some regulation made by the Treasury in making the discharge, he could be called to account by the Secretary of the Treasury should that official see fit. But as long as no statute was violated by the manner of plaintiff's discharge, the fact that it was not in ac-

cordance with some Treasury directions can not, in our opinion, avail him.

* * * It appears to be well settled not only by court decisions but by an unbroken practice in the military service which dates back to a time long preceding the organization of our Government that the courts will not interfere with or review the actions of proper officers in the military forces done in some administrative proceeding and not in conflict with any statute.

B. SINCE THE CHARACTER OF DISCHARGE TO BE GIVEN ON SEPARATION WAS DISCRETIONARY, IT COULD NOT, UNDER SETTLED PRINCIPLES, BE CONTROLLED BY MANDAMUS

The error of the court below in undertaking to "interfere with or review the actions of proper officers in the military forces done in some administrative proceeding and not in conflict with any statute" is highlighted by the circumstance that what is here involved is an action for a mandatory injunction. Accordingly, there is brought into play the firmly established rule that decisions of administrative officers, where they involve an exercise of discretion and insofar as they are not unreasonable or plainly wrong, will not be reversed or set aside by process in the nature of mandamus. The rule has been consistently applied by this Court, regardless of the label attached to the plaintiff's pleading,[20] and regardless

[20] The mandatory injunction here sought is in substance and effect the precise equivalent of a writ of mandamus, and its issuance is governed by identical considerations. *Gaines*

of the office held by the defendant. We cite only a few of the leading cases. *Litchfield* v. *Register and Receiver,* 9 Wall. 575 (local land officers); *Riverside Oil Co.* v. *Hitchcock,* 190 U. S. 316 (Secretary of the Interior); *Wilbur* v. *United States,* 281 U. S. 206 (same); *Denby* v. *Berry,* 263 U. S. 29 (Secretary of the Navy); *French* v. *Weeks,* 259 U. S. 326 (Secretary of War); *United States* v. *Lynch,* 137 U. S. 280 (Fourth Auditor and Second Comptroller); *United States ex rel. Girard Co.* v. *Helvering,* 301 U. S. 540 (Commissioner of Internal Revenue); *Interstate Commerce Commission* v. *United States,* 289 U. S. 385 (Interstate Commerce Commission).

The function of a writ of mandamus was summarized by Mr. Justice Van Devanter, speaking for the Court in *Wilbur* v. *United States,* 281 U. S. 206, in the following terms (pp. 218–219):

> Mandamus is employed to compel the performance, when refused, of a ministerial duty, this being its chief use. It also is employed to compel action, when refused, in matters involving judgment and discretion, but not to direct the exercise of judgment or discretion in a particular way nor to direct the retraction or reversal of action already taken in the exercise of either.
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> The duties of executive officers, such as

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v. *Thompson,* 7 Wall. 347, 352; *Miguel* v. *McCarl,* 291 U. S. 442, 452; cf. *Warner Valley Stock Co.* v. *Smith,* 165 U. S. 28, 33.

> the Secretary of the Interior, usually are connected with the administration of statutes which must be read and in a sense construed to ascertain what is required. But it does not follow that these administrative duties all involve judgment or discretion of the character intended by the rule just stated. Where the duty in a particular situation is so plainly prescribed as to be free from doubt and equivalent to a positive command it is regarded as being so far ministerial that its performance may be compelled by mandamus, unless there be provision or implication to the contrary. But where the duty is not thus plainly prescribed but depends upon a statute or statutes the construction or application of which is not free from doubt, it is regarded as involving the character of judgment or discretion which cannot be controlled by mandamus.

It is clear that in this case the Secretary of War did not have in 1918–1919 a plain ministerial duty, equivalent to a positive command, to issue to respondent an Honorable Discharge from the Army, he never having been accepted by the Army. And it is clear *a fortiori* that neither the present petitioners nor their immediate predecessors in office had a plain ministerial duty, equivalent to a positive command, to issue to respondent in 1943 and thereafter a form of discharge different from that given him in 1919, and which

neither he nor any of the thousands of other men similarly situated had ever questioned in the intervening years.

C. THE FOREGOING RULE APPLIES WITH PARTICULAR FORCE TO MATTERS INVOLVING THE ADMINISTRATION OF THE ARMED FORCES

The rule that discretionary action on the part of executive officers acting within the scope of their statutory authority will not be controlled by the courts has particular force as applied to the military establishment; and this Court has repeatedly refused to sanction judicial intrusion into the realm of ordinary military and naval administration. "To those in the military or naval service of the United States the military law is due process." *Reaves* v. *Ainsworth,* 219 U. S. 296, 304.

In that case, where a former Army officer sought a writ of certiorari in the District of Columbia courts to review the proceedings of an Army promotion board finding him not qualified for promotion, and to annul an order made by the President discharging him from the Army, the proceedings were held to be not subject to review by the courts. This Court said (219 U. S. at 306):

> * * * The courts have no power to review. The courts are not the only instrumentalities of government. They cannot command or regulate the army. * * * If it had been the intention of Congress to

> give an officer the right to raise issues and controversies with the board upon the elements, physical and mental, of his qualifications for promotion and carry them over the head of the President to the courts, and there litigated, it may be, through a course of years, upon the assertion of error or injustice in the board's rulings or decisions, such intention would have been explicitly declared. The embarrassment of such a right to the service, indeed the detriment of it, may be imagined.

In *French* v. *Weeks,* 259 U. S. 326, and *Creary* v. *Weeks,* 259 U. S. 336, judicial relief by way of mandamus was sought against the Secretary of War by officers formerly on the active list of the Army to annul orders issued by the Secretary under Section 24b of the National Defense Act (Act of June 4, 1920, c. 227, 41 Stat. 759, 773; 10 U. S. C. 571), in one case retiring the relator and in the other discharging him from the Army. In both cases the Court held that the trial court "did not have jurisdiction to order the writ of mandamus prayed for." 259 U. S. at 336, 344.

In *Denby* v. *Berry,* 263 U. S. 29, an officer of the Naval Reserve Force petitioned for a writ of mandamus to compel the Secretary of the Navy to revoke an order directing the relator's release from active service in the Navy and to compel the Secretary to order him before a retiring board. A board of medical survey had found that relator was under permanent disability incurred in line

of duty, not the result of his own misconduct, and had recommended that he be sent before a retiring board. The Secretary of the Navy disapproved this recommendation and directed that "this officer be ordered to proceed to his home and be released from active duty." The Bureau of Navigation (the present Bureau of Naval Personnel) accordingly advised the relator that "you are hereby detached from such duty as may have been assigned you; you will proceed to your home and regard yourself honorably discharged from active service in the Navy." The relator wrote the Secretary requesting that his case be referred to a retiring board for consideration, and, upon the Secretary's refusal, brought suit. The Court of Appeals modified but affirmed a judgment awarding the writ. *Denby* v. *Berry,* 279 Fed. 317 (App. D. C.). It construed the order of the Bureau of Navigation as a "general discharge", and held that mandamus will "lie to correct the wrong inflicted upon the plaintiff, and to compel the vacation of the orders. This will, of course, operate to reinstate plaintiff to his full standing as a Naval Reserve Officer" (279 Fed. at 329).

This Court reversed the judgment, holding that mandamus would not lie since the matters in controversy all rested in the discretion of the Secretary of the Navy. Chief Justice Taft said (263 U. S. at 33–34):

> * * * Orders releasing individuals from active service and putting them on in-

active duty were clearly within the power of the President and of the Secretary of the Navy acting for him in the administration of the act. Nowhere is there found any limitation upon the discretion of the Executive in this regard. The orders in such cases were in the nature of military orders by the Commander-in-Chief in the assignment or withdrawal of available forces to or from duty for the good of the service. Such orders of withdrawal could not and did not make members of the Naval Reserve Force civilians. They did not release them from obligation under their enrollment to render active service again when ordered to do so by the proper authority. When the Bureau of Navigation detached relator from active duty and told him to go home and regard himself as honorably discharged from active service in the Navy, he was not ousted from the Naval Reserve Force or the Navy. The words "honorably discharged" were only to advise him and others that the change of his status from active to inactive duty was not because of his fault or misconduct.

Here, similarly, the Discharge from Draft carried no stigma of fault or misconduct on respondent's part. All that happened was that the Secretary of War, in the exercise of his discretion, determined that men drafted but not accepted for the Army should be treated on a parity with men drafted but rejected by the

Army; that such men should not be discharged from the Army, since they never were in the Army; and that Par. 150 of the Army Regulations of 1913 should be construed as applicable only to men actually in the Army. That determination, as we have shown in some detail above, pp. 23–27, was neither arbitrary, capricious, nor plainly wrong. The only statute involved—the 108th Article of War—did not purport to direct the Secretary of War to issue either a particular kind of discharge or a particular form of discharge certificate. Consequently the case, on this analysis also, falls within the unquestioned rule that neither the writ of mandamus nor a mandatory injunction is available to compel an executive officer to exercise his judgment and discretion in a particular way. "Where there is discretion, * * * even though its conclusion be disputable, it is impregnable to mandamus." *Alaska Smokeless Coal Co.* v. *Lane,* 250 U. S. 549, 555.

D. THE FOREGOING RULES ARE NOT CHANGED BY ANYTHING IN THE ADMINISTRATIVE PROCEDURE ACT, IF INDEED ITS PROVISIONS ARE APPLICABLE TO THE PRESENT PROCEEDING

The judgment below was entered on March 25, 1946 (R. 29). Nearly two and a half months later, on June 11, 1946, the President approved the Administrative Procedure Act (Public Law 404, 79th Cong., 2d sess.), which in Section 12 provides among other things that

> This Act shall take effect three months after its approval except that sections 7 and 8 [Hearings, Decisions] shall take effect six months after such approval, the requirement of the selection of examiners pursuant to section 11 shall not become effective until one year after such approval, and no procedural requirement shall be mandatory as to any agency proceeding initiated prior to the effective date of such requirement.

The only section which could conceivably apply here would be Section 10—Judicial Review—which became effective September 11, 1946. For the reasons pointed out below, pp. 42–46, we do not believe that this section was intended to change the scope of review applicable to a case such as the present one, nor to abrogate or limit the rules just discussed. But, in any event, and regardless of the scope of Section 10, we believe that its provisions are not and were not intended to apply to pending proceedings.

Neither in the Act nor its legislative history is there any reference to judicial proceedings seeking review of administrative action which had already been commenced. There is, throughout the legislative history, evidence of intent to afford the various agencies ample time to prepare and make such adjustments in their procedure as the provisions of the Act may require, H. Rep. 1980, 79th Cong., 2d sess., p. 47; S. Rep. 752,

79th Cong., 1st sess. p. 30, and this intent is underscored by the portions of Section 12 quoted above.

It would be anomalous to suppose that Congress intended to make a procedural requirement of the Act inapplicable to an administrative proceeding initiated before the effective date of the requirement but applicable to a judicial proceeding concluded in the lower courts before the effective date of the requirement.[21]

It is not necessary in this case to determine the precise point at which Section 10 would apply. It is sufficient to note that to have that section apply, as here, at some appellate stage of a pending proceeding, would not make for certainty or stability of administrative action, and would be productive only of confusion. While undoubtedly Congress had the power to change the scope of judicial review so as to affect pending proceedings, even at the ultimate appellate stage, the consequences of such a change would be so unsettling that clear and unmistakable evidence of an intention to effect that result should be required. Here there is no such evidence. Accordingly, it seems clear that the provisions of Section 10, which went into effect on September 11, 1946, were, at the very least, not intended to affect the scope of judicial

[21] The general principle that statutes are not to be construed retrospectively, see *United States* v. *Heth*, 3 Cranch 399, 413, is applicable also to statutes governing procedure. E. g., *United States* v. *St. Louis, etc., Ry. Co.*, 270 U. S. 1, 3.

review in proceedings in which certiorari had been applied for well before that date. *Semble accord, United States* v. *Ruzicka*, No. 54, this Term, decided December 16, 1946.

In any event, the terms and legislative history of the Administrative Procedure Act make it abundantly clear that Section 10 was designed, in general, to restate existing law, and that there was no disposition on the part of the Act's sponsors to change the well settled rule, *supra*, pp. 35–39, that decisions of the Secretary of War relating to military administration which are not shown to be plainly in violation of statute law, will not be set aside by the courts by process in the nature of mandamus.

The general legislative history of the Administrative Procedure Act is set out in S. Doc. 248, 79th Cong., 2d sess., and will not be repeated here. See also 14 U. S. Law Week 2709–2728.

Section 10 expressly excepts judicial review where "(2) agency action is by law committed to agency discretion." We think that the plain terms of the 108th Article of War bring the present case within this exception, and that accordingly it is unnecessary to argue at length the inapplicability of the remainder of the section.

Generally, most contemporaneous comments stress that the bill did not change existing law as to the scope of judicial review. The original draft of Section 10, prepared by the American Bar Association's Committee on Administrative

Law, carried the comment that it did not attempt to expand the scope of judicial review. 30 A. B. A. J. 46.[22] The Attorney General advised the Senate Judiciary Committee that Section 10, "in general, declares the existing law concerning judicial review" (S. Rep. 752, 79th Cong., 1st sess., p. 43), a view to which he consistently adhered. See his memorandum (92 Cong. Rec. A3154), which states:

> Section 10 as to judicial review does not, in my view, make any real changes in existing law. This section in general declares the existing law concerning judicial review. It is an attempt to restate in exact statutory language the doctrine of judicial review as expounded in various statutes and as interpreted by the Supreme Court. I know that some agencies are quite concerned about the phraseology used in section 10 for fear that it will change the existing doctrine of judicial review which has been settled for the particular agency concerned. I feel sure that should this section be given the interpretation which is intended, namely, that it is merely a restatement of existing law, there should be no difficulty for any agency. We may in a sense look at section 10 as an attempt by Congress to place into statutory language existing methods of review.

And see also S. Rep. 752, 79th Cong., 1st sess.,

[22] And see Hearings before the House Committee on the Judiciary on H. R. 1203, 79th Cong., 1st sess., p. 38.

pp. 43-44, quoting from another statement of the Attorney General:

> Section 10. This section, in general, declares the existing law concerning judicial review. It provides for judicial review except insofar as statutes preclude it, or insofar as agency action is by law committed to agency discretion. A statute may in terms preclude judicial review or be interpreted as manifesting a congressional intention to preclude judicial review. Examples of such interpretation are: *Switchmen's Union of North America* v. *National Mediation Board* (320 U. S. 297); *American Federation of Labor* v. *National Labor Relations Board* (308 U. S. 401); *Butte, Anaconda and Pacific Railway Co.* v. *United States* (290 U. S. 127). Many matters are committed partly or wholly to agency discretion. Thus, the courts have held that the refusal by the National Labor Relations Board to issue a complaint is an exercise of discretion unreviewable by the courts (*Jacobsen* v. *National Labor Relations Board*, 120 F. (2d) 96 (C. C. A. 3d); *Marine Engineers' Beneficial Assn.* v. *National Labor Relations Board*, decided April 8, 1943 (C. C. A. 2d), certiorari denied, 320 U. S. 777). In this act, for example, the failure to grant a petition filed under section 4 (d) would be similarly unreviewable.

In view of this legislative history, and in view of the circumstance that nothing in the language of Section 10 indicates any intention to interfere

with the exercise of a discretionary power vested by law in any agency, we think it plain that Congress did not intend to disturb the settled rule discussed at length above, pp. 35–39, which renders the decisions of the Secretary of War in the course of administering the military establishment, decisions made by him within the scope of the statutory discretion vested in him by Congress—in this case, within the limits of the 108th Article of War—immune from judicial review. From *Decatur* v. *Paulding*, 14 Pet. 497, decided at the January Term, 1840, through *Denby* v. *Berry*, 263 U. S. 29, decided at the October Term, 1923, this Court has steadfastly refused to permit the judiciary to relieve the Secretaries concerned from their direction of and command over, as *alter ego* of the Commander-in-Chief, the Army or the Navy.[23] Certainly if Congress had intended by passing the Administrative Procedure Act to invest the federal courts with the power of judicial review over the normal incidents of military and naval administration, apt language to do so could easily have been fashioned and would certainly have been used. The circumstance that neither the rule as to the scope of relief in the

[23] In *Miguel* v. *McCarl*, 291 U. S. 442, relied upon by the court below (R. 27), the War Department agreed with the petitioner, and, together with the Solicitor General, contended that "The Comptroller General's duty was purely ministerial and his refusal to follow the plain mandate of the statute may be coerced in mandamus or in equity. His attempted exercise of discretion in a field in which he had no discretion can not serve to shield him from these remedies." 291 U. S. at 448; see also p. 450.

nature of mandamus nor the rule as to the non-reviewability of action pertaining to military and naval administration was referred to, seems to us proof positive, in the face of the language and legislative history of the Administrative Procedure Act, that no change in either was intended to be made. Consequently, without at this time inquiring whether, in other respects, the Act may have contemplated some slight alterations in the scope of judicial review in other connections, we assert with confidence that, as to the rules discussed in the present brief, no changes whatever were either effected or intended to be effected.

Indeed, as Sections 131 and 207 of the Legislative Reorganization Act of 1946, *supra* p. 15, indicate, the tendency of Congress is to withdraw entirely from the field of routine military administration, and to leave to the Departments concerned a matter which has traditionally been the subject of legislative action in the past, namely, the correction of military and naval records.

E. THE CIRCUMSTANCE THAT A DISCHARGE FROM DRAFT HAS BEEN TREATED BY CONGRESS AND SOME STATE COURTS AS BEING EQUIVALENT, IN SOME CASES, TO AN HONORABLE DISCHARGE, IS FAR FROM SUPPORTING THE VIEW THAT THE SECRETARY OF WAR CAN BE COMPELLED TO ISSUE THE LATTER TO A MAN WHO RECEIVED ONLY THE FORMER

We have already pointed out, *supra*, pp. 27–29, that Congress in 1924 recognized the difference between a Discharge from Draft and an Honorable Discharge from the Army, and that while it denied Adjusted Compensation to the holder of

the former, it did accord him rights to disability compensation and to insurance.

A similar diversity of treatment is reflected in the rulings of federal law and accounting officers, though it may be said that the trend seems to be unfavorable to men simply discharged from the draft. The Comptroller General held (7 Comp. Gen. 570) that a deceased holder of a Discharge from Draft was not entitled to burial at public expense as a "veteran of any war" within the meaning of Section 201 (1) of the World War Veterans' Act, as amended (38 U. S. C. 472). The Attorney General recently held (40 Op. A. G., No. 103) that a person inducted by a local board on November 11, 1918, and discharged two hours later by the cancellation of all draft calls did not serve "on active duty" within the contemplation of the Veterans' Preference Act of 1944, Act of June 27, 1944, c. 287, 58 Stat. 387, 5 U. S. C., Supp. V, 851–869.[24] And, while the Comptroller of the Treasury, following The Judge Advocate General of the Army, had early ruled (25 Comp. Dec. 771; 26 Comp. Dec. 57) that a Discharge from Draft entitled the holder to payment of the $60 mustering-out bonus authorized by Sec. 1406 of the Revenue Act of 1918, c. 18, 40 Stat. 1057, 1151, the Comptroller General refused to follow those decisions and held the contrary (1 Comp. Gen. 379).

[24] Distinguish the situation where the Discharge from Draft is not delivered, and the person for whom it is intended in fact performs military service before his separation. Dig. Op. JAG (1912–40), par. 466 (3) (3), p. 379.

Similar differences of opinion as to the effect to be accorded a Discharge from Draft are reflected by the rulings of state courts; but those differences, for the most part, turn on the terms of the state statutes involved rather than on whether the Discharge from Draft was issued because of rejection for physical disqualification or by reason of the cancellation of draft calls.

Four states hold that the Discharge from Draft is not the equivalent of an Honorable Discharge, and does not entitle its holder to the statutory benefits conferred upon honorable discharged veterans. *Bannister* v. *Soldiers Bonus Board,* 43 R. I. 346 (eligibility for bonus); *Zearing* v. *Johnson,* 10 Cal. App. 2d 645 (right to tax exemption); *Lamb* v. *Kroeger,* 233 Iowa 730 (same); *Dunn* v. *Commissioner of Civil Service,* 281 Mass. 376 (veterans' civil service preference). New York and the court below have held the contrary with respect to veterans' civil service preferences. *Matter of Lore* v. *Forbes,* 173 Misc. 1066, affirmed, 259 App. Div. 806; *Matter of Donohue* v. *Huie,* 259 App. Div. 645, affirmed, 285 N. Y. 557; *Hurley* v. *Crawley,* 50 F. 2d 1010 (App. D. C.).

These cases, and the federal administrative rulings, obviously turn on the precise terms of the state and federal statutes involved. They decide nothing as to the particular person's right to a particular kind of discharge. Indeed, in view of the statement of the Iowa court in respondent's case (*Lamb* v. *Kroeger, supra,* 233

Iowa at 734), that it was only "concerned with what the Iowa Legislature, not draft-law administrators, or United States Government officials, meant by the term 'honorably discharged soldier * * * of the war with Germany'," it may well be that he would have failed to obtain the desired tax exemption even on the basis of the ruling below. Here, however, we are concerned with his federal status, more particularly his status *vis-à-vis* the War Department.

The fact that the two types of discharges may or may not carry identical benefits is far from proving that the holder of one has a right to be issued the other. For, whatever else respondent may be entitled to by reason of his induction on November 11, 1918, it is clear on the authorities discussed above, pp. 13–14, 30–32, that he is not entitled to have the courts compel the Secretary of War and The Adjutant General, U. S. Army, to issue him an Honorable Discharge. Indeed, as we have already suggested (*supra,* pp. 27–29), the action of the military authorities in this case is not only unassailable as an original question and in view of the nature of the remedy sought, it is probably fortified by legislative ratification; Congress in enacting the cited Acts in 1924 recognized the Discharge from Draft, and specifically provided in what instances it should, and in what it should not, entitle its holder to the benefits conferred on persons having Honorable Discharges.

III

IN ANY EVENT, RESPONDENT'S CLAIM IS NOW BARRED BY LACHES

More than a quarter of a century after respondent had received a certificate headed "Discharge from Draft" in large and unmistakable capital letters (R. 17), he brought the present action to compel the Secretary of War and the Adjutant General of the Army to issue to him a certificate of "Honorable Discharge from the United States Army". Even if respondent's claim had any vestige of merit as an original proposition, it is now barred by laches.

The doctrine of laches "is based upon grounds of public policy, which require, for the peace of society the discouragement of stale demands." *Mackall* v. *Casilear*, 137 U. S. 556, 566. "A neglected right, if neglected too long, must be treated as an abandoned right which no court will enforce"; there "always comes a time when the best of rights will, by reason of neglect, pass beyond the protecting reach of the hands of equity." *Moran* v. *Horsky*, 178 U. S. 205, 208. Over twenty-five years' delay in resorting to the courts is obviously unreasonable.[25]

[25] It may be significant in this connection that the review of discharges authorized by Section 301 of the Servicemen's Readjustment Act of 1944, 38 U. S. C., Supp. V, 693h, is, by the terms of that provision, barred after fifteen years.

And, while the statute of limitations relating to actions at law does not apply to mandamus proceedings of its own force, see *Arant* v. *Lane*, 249 U. S. 367, 371–372, it is well settled that the doctrine of laches does. *Arant* v. *Lane*, *supra*; cf. *Matter of Eastern Cherokees*, 220 U. S. 83. As was pointed out in the *Arant* case (249 U. S. at 371):

> This court has lately said that while mandamus is classed as a legal remedy, it is a remedial process which is awarded, not as a matter of right, but in the exercise of a sound judicial discretion and upon equitable principle, *Duncan Townsite Co.* v. *Lane*, 245 U. S. 308. It is an extraordinary remedy, which will not be allowed in cases of doubtful right, *Life & Fire Insurance Co.* v. *Wilson*, 8 Pet. 291, 302, and it is generally regarded as not embraced within statutes of limitation applicable to ordinary action, but as subject to the equitable doctrine of laches. *Chapman* v. *County of Douglas*, 107 U. S. 348, 355; *Duke* v. *Turner*, 204 U. S. 623, 628.

Accordingly, relatively short delays, far less than that here involved, have been held to bar actions for mandamus, both here and in the court below. *Arant* v. *Lane*, *supra* (twenty months); *Caswell* v. *Morgenthau*, 98 F. 2d 296 (App. D. C.), certiorari denied, 305 U. S. 596 (eighteen months); *United States ex rel. Cromwell* v. *Doyle*, 99 F. 2d 448 (App. D. C.), certiorari denied, 306 U. S. 640 (thirty months).

The court below rejected the defense of laches on the ground that only a mere matter of time was involved here. It said (R. 28):

> * * * Although the appellant was discharged on November 14, 1918, and received a certificate of Discharge from Draft on January 26, 1919, he was told on November 15, 1918, by his local board that the Presidential order of November 11, 1918, discharging from the army all registrants who had been inducted but not entrained, had "the effect of an honorable discharge from the army." Until 1941, the appellant had no basis for supposing that there was any doubt concerning his status as an honorably discharged soldier. When that status was challenged for the first time, he manifested extraordinary diligence in asserting his rights. Moreover, the appellees do not claim that there has been any change of condition or relations since 1918 because of which it would be an injustice to them to permit the appellant to assert his rights now. * * *

The assumptions on which this ruling rests are demonstrably incorrect. It must be obvious that the notice from the local draft board (R. 15), could not bind the Secretary of War, by some species of informal and inarticulate estoppel, as to the type of discharge which he should issue to persons in respondent's situation, the more so since that board had been specifically advised by

the Provost Marshal General, announcing the cancellation of all draft calls, that (R. 16) "The issue of formal papers of discharge will be considered and determined later * * *." In any event, the court below misinterpreted the words in the draft board's notice, "has the effect of an honorable discharge". A similar error on its part led to reversal in *Denby* v. *Berry*, 263 U. S. 29, discussed *supra*, pp. 36–38, where Chief Justice Taft pointed out (263 U. S. at 34) that—

> * * * The words "honorably discharged" were only to advise him and others that the change of his status from active to inactive duty was not because of his fault or misconduct.

Nor is there any support for the statement of the court below that until the decision of the Supreme Court of Iowa in *Lamb* v. *Kroeger*, 233 Iowa 730, respondent "had no basis for supposing that there was any doubt concerning his status as an honorably discharged soldier."

That decision disclosed no fact hitherto unknown; it dealt solely with the construction of a state statute granting a tax exemption. As we have already pointed out, *supra*, pp. 4–5, the Iowa court reached that construction as a matter of state law, following a ruling of the Attorney General of Iowa made in 1922, and in express disregard of what respondent's status might be as a matter of federal law.

It is respondent's dissatisfaction with the Iowa court's interpretation of Iowa law which has occasioned the present proceeding. But the certificate issued to respondent in 1919 shows on its face what it purported to be, a Discharge from Draft and not an Honorable Discharge from the United States Army. If, as he now contends, the issuance of the certificate he received was in violation of existing regulations, it must follow that he was chargeable in 1919 with the distinction between what he received and what he now contends was required by those regulations. We have cited and discussed above, pp. 46–49, the numerous state court decisions and federal rulings turning on that difference, most of which antedate *Lamb* v. *Kroeger*. But whether or not respondent is bound at his peril to know the law, certain it is that the distinction between persons discharged from draft and persons honorably discharged from the Army was created neither by the Iowa Supreme Court in 1943 nor by the Attorney General of Iowa in 1922.

We submit that respondent's claim is a stale one, which no court should enforce.

One further thought may not be inappropriate in connection with the present proceeding.

Over a century ago, Chief Justice Taney, speaking for the Court, observed that "The interference of the courts with the performance of the ordinary

duties of the executive departments of the government, would be productive of nothing but mischief; and we are satisfied, that such a power was never intended to be given to them." *Decatur* v. *Paulding*, 14 Pet. 497, 516, quoted with approval in *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113, 131–132.

Brief examination of the potential consequences of the ruling below underscores the prophetic nature of the utterance just quoted.

There were 55,855 inducted individuals who were not accepted by the Army because of the cancellation of draft calls when the Armistice was signed; and an additional 194,385 men were rejected at the mobilization camps for physical and other reasons.[26] Of the men in respondent's situation, the best actuarial estimate now available is that somewhat over 45,000 are still alive. If the decision below remains undisturbed, then this large group (and the next of kin of those deceased) would be able to claim very substantial benefits, benefits which Congress up to now has advisedly withheld from them.[27]

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[26] *Final Report of the Provost Marshal General*, p. 54.

[27] (a) Mustering out bonus under Section 1406 of the Revenue Act of 1918; see p. 47, *supra*.

(b) Funeral expenses under 38 U. S. C. 472; see p. 47, *supra*.

(c) Adjusted Compensation under the 1924 Bonus Act; see p. 28, *supra*.

(d) Burial in national cemeteries. Par. 8, Army Regulations 30–1840, dated October 9, 1944. Reburial of those deceased might be involved.

Such a far-reaching unsettling of military and fiscal administration nearly a generation after the close of the conflict involved is a factor to be considered in determining whether respondent's delay constituted laches. Cf. *Matter of Eastern Cherokees*, 220 U. S. 83; *Hayward* v. *National Bank*, 96 U. S. 611.

Here, as in *Decatur* v. *Paulding*, 14 Pet. 497, 516, which involved the administration of the pension fund, the issuance of relief in the nature of mandamus would result in "the greatest confusion and disorder." Consequently the case falls within the rule enunciated by Mr. Justice Brandeis in *Duncan Townsite Co.* v. *Lane*, 245 U. S. 308, 311–312, that

> Mandamus * * * issues to remedy a wrong, not to promote one; to compel the performance of a duty which ought to be performed, not to direct an act which will work a public or private mischief or will be within the strict letter of the law but in disregard of its spirit.

Even if there were no other reason for denying respondent's request, it is submitted that the "confusion and disorder" which would be caused if his request were granted "renders the application of the doctrine of laches to his case peculiarly appropriate in the interests of justice and sound public policy." *Arant* v. *Lane*, 249 U. S. 367, 372.

Considering all the circumstances of the case, we submit that a sound and informed judicial discretion requires that, wholly apart from its merits or demerits, respondent's claim be now rejected because of his laches.

CONCLUSION

The judgment below should be reversed, with instructions to reinstate the judgment of the district court.

Respectfully submitted.

GEORGE T. WASHINGTON,
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JOHN F. SONNETT,
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DECEMBER 1946.

APPENDIX

1. The 108th Article of War of 1916 (Act of August 29, 1916, c. 418, 39 Stat. 619, 668) is as follows:

> ART. 108. SOLDIERS—SEPARATIONS FROM THE SERVICE.—No enlisted man, lawfully inducted into the military service of the United States, shall be discharged from said service without a certificate of discharge, signed by a field officer of the regiment or other organization to which the enlisted man belongs or by the commanding officer when no such field officer is present; and no enlisted man shall be discharged from said service before his term of service has expired, except by order of the President, the Secretary of War, the commanding officer of a department, or by sentence of a general court martial.

2. The Administrative Procedure Act, Public Law 404, 79th Cong., 2d sess., provides in pertinent part as follows:

> JUDICIAL REVIEW
>
> SEC. 10. Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—
>
> (a) RIGHT OF REVIEW.—Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

(b) FORM AND VENUE OF ACTION.—The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute, or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law.

(c) REVIEWABLE ACTS.—Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to juridicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final shall be final for the purposes of this subsection whether or not there has been presented or determined any application for a declaratory order, for any form of reconsideration, or (unless the agency otherwise requires by rule and provides that the action meanwhile shall be inoperative) for an appeal to superior agency authority.

(d) INTERIM RELIEF.—Pending judicial review any agency is authorized, where it finds that justice so requires, to postpone the effective date of any action taken by it. Upon such conditions as may be required and to the extent necessary to prevent irrep-

arable injury, every reviewing court (including every court to which a case may be taken on appeal from or upon application for certiorari or other writ to a reviewing court) is authorized to issue all necessary and appropriate process to postpone the effective date of any agency action or to preserve status or rights pending conclusion of the review proceedings.

(e) SCOPE OF REVIEW.—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

* * * * *

CONSTRUCTION AND EFFECT

SEC. 12. Nothing in this Act shall be held to diminish the constitutional rights of any person or to limit or repeal additional requirements imposed by statute or otherwise recognized by law. Except as otherwise required by law, all requirements or privileges relating to evidence or procedure shall apply equally to agencies and persons. If any provision of this Act or the application thereof is held invalid, the remainder of this Act or other applications of such provision shall not be affected. Every agency is granted all authority necessary to comply with the requirements of this Act through the issuance of rules or otherwise. No subsequent legislation shall be held to supersede or modify the provisions of this Act except to the extent that such legislation shall do so expressly. This Act shall take effect three months after its approval except that sections 7 and 8 shall take effect six months after such approval, the requirement of the selection of examiners pursuant to section 11 shall not become effective until one year after such approval, and no procedural requirement shall be mandatory as to any agency proceeding initiated prior to the effective date of such requirement.

3. Paragraph 150 of the Army Regulations of 1913, corrected to April 15, 1917, was as follows:

"150. Blank forms for discharge and final statements will be furnished by The Adjutant General's Department and will be retained in the personal custody of company commanders. Discharge certificates will be used in the discharge of enlisted

men and for no other purpose, and will be of three classes: For honorable discharge, for discharge, and for dishonorable discharge.

They will be used as follows:

1. The blank for honorable discharge, when the soldier's conduct has been such as to warrant his reenlistment and his service has been honest and faithful.

2. The blank for dishonorable discharge, for dishonorable discharge by sentence of a court martial or a military commission.

3. The blank for discharge when the soldier is discharged except as specified under sections 1 and 2 of this paragraph (C. A. R. Nos. 14 and 34).

4. War Department Circular No. 651, dated January 12, 1918, provided as follows:

PREPARATION AND DISPOSITION OF THE INITIAL RECORDS OF MEN INDUCTED INTO THE NATIONAL ARMY

1. Circular of instructions to Mustering Officers and Medical Examiners at National Army Mobilization Camps, from this office, dated August 28th, 1917, and telegram of November 12th, 1917, supplementing same, are rescinded and the following instructions for the preparation and disposition of the initial records of men inducted into the military service under the Selective Service Regulation, are substituted therefor.

2. *Initial records of accepted men:*

The following individual records of enlisted men accepted for military service at place of mobilization will be forwarded to The Adjutant General of the Army as soon as completed. (See paragraph 12.)

(a) Enlisted men and Assignment Card, Form No. 22–2, A. G. O. (No oath of enlistment is required).

(b) Report of physical examination, Form No. 1010, P. M. G. O.

(c) Identification Record Card, Form No. 260 A. G. O. (Photographs and photographic negatives are not required).

3. *Records of rejected men:*

The following individual records of enlisted men rejected for military service at place of mobilization, will be forwarded to The Adjutant General of the Army, as soon as practicable.

(a) Report of Physical Examination, Form No. 1010 P. M. G. O.

(b) *A true copy* of the certificate of discharge from draft, Form No. 638 A. G. O.

4. *Disposition of rejected men:*

All men rejected for military service at place of mobilization will be furnished the following:

(a) A discharge from draft on Form No. 638, A. G. O.

(b) Final statements. (The rejected man is entitled to pay from date of reporting for military duty to date of discharge, less pay for any time absent without leave, or absent in desertion, or any amount due United States for reward paid for apprehension and delivery of deserter, etc., and to travel allowances at the rate of 3½ cents per mile from place of discharge to place of reporting for military duty).

5. *Discharges under section 51 Selective Service Regulations:*

Men charged with desertion delivered to local boards and found by local boards to be disqualified for military service because of physical unfitness or being alien enemies,

will be reported to the proper mobilization camp commanders by local boards and the camp commanders upon the evidence submitted by the local boards are authorized to discharge or give instructions as to disposition of such men, and in each case of discharge, the following will be furnished:

(a) A discharge from draft on Form No. 638, A. G. O, completed, dated and signed, to be forwarded to the man through the local board, making the report.

(b) *A true copy* of each discharge from draft so given, to be forwarded to the Adjutant General of the Army.

6. *Discharges under sections 137, 138 and 139. Selective Service Regulations:*

When the commanding officer of a mobilization camp orders a discharge under sections 137, 138 or 139 Selective Service Regulations, he will in each case furnish the following:

(a) A discharge from draft on Form No. 638, A. G. O., completed, dated and signed, to be forwarded to the man through the state Adjutant General making the report.

(b) *A true copy* of each discharge from draft, so given, to be forwarded to The Adjutant General of the Army.

7. *Certificates of disability:*

Certificates of disability will not be given in cases of men *rejected* for military service on account of physical unfitness.

8. *Initial muster rolls:*

Initial muster rolls are not required.

9. *Pay and allowances:*

Only the pay and allowances given in cases enumerated above are authorized for men discharged as herein provided.

10. *Service records:*

The service record will be prepared as directed in the instructions thereon with the following exceptions:

(a) The form for Report of Assignment in the service record, will be detached and destroyed in all cases in which the assignment is reported on the Enlistment and Assignment Card, and the words "Assignment reported on enlistment and assignment card" will be noted on stub of Report of Assignment in lieu of the date of mailing report.

(b) When assignment is reported on the form for Report of Assignment in the service record, the line "Who was accepted for enlistment at ----------" will be stricken out.

(c) The line "Accepted for enlistment at ----------" on page 3 of the service record, will be stricken out as it is not applicable to enlistment in the National Army.

(d) If the soldier reported for military duty on the date and at the place specified in notice from the local board, the words "Reported same date and place" will be entered on page 3 of the Service record immediately below the line "Enlisted------ 191--, at ----------" otherwise the date and place of reporting will be stated.

11. *Registration cards and reports of physical examination:*

Registration cards will be filed until further orders with the records of the headquarters of the division, camp, post or station at whichever of these places the mobilization point may be. The duplicate of the report of physical examination will be filed with the records of the division

surgeon in the office of the division adjutant or in the office of the camp, post or station surgeon at whichever of these places the mobilization point may be.

12. *Method of Forwarding Records:*

The different papers relating to the same soldier will not be fastened together but they will be left separated and forwarded to The Adjutant General of the Army with letter of transmittal in which will be enumerated in alphabetical order the names of the men whose papers are being transmitted. Where the papers of several soldiers are forwarded at the same time, separate packages will be made of forms No. 22–2, A. G. O., No. 1010, P. M. G. O., No. 260, A. G. O., etc., and the several packages with the letter of transmittal pertaining thereto, will be made into one bundle which will be mailed as directed above. Forms will be placed in packages in the same order in which the names appear in the letter of transmittal.

BY ORDER OF THE SECRETARY OF WAR:

JOHN BIDDLE,
Major General, Acting Chief of Staff.

OFFICIAL:

H. P. MCCAIN,
The Adjutant General.

5. The text of War Department Circular No. 111, dated December 4, 1918, is as follows:

DISCHARGE FROM THE DRAFT UNDER THE PRESIDENT'S ORDER OF NOVEMBER 11, 1918

1. Under the President's order of November 11, 1918, all registrants inducted by Local Boards, but who had not arrived at a

mobilization camp or station were ordered discharged.

2. In order that all records of such men may be properly completed, the following instructions will be complied with:

a. The following are the forms and records prepared by Local Boards and forwarded to the commanders of the Mobilization camps or stations concerned, for the discharge of the men designated in paragraph 1:

(1) Double Post Card, Form No. 1029, A and B, P. M. G. O., Original, no copies.

(2) Final Statement of Accounts, Form No. 2017, P. M. G. O., Original and two (2) copies.

(3) Physical Examination, Form No. 1010, P. M. G. O., Original and one (1) copy.

(4) Registration Card, Form No. 1, P. M. G. O., One (1) Form.

b. Immediately upon receipt of these records by the camp commanders concerned, the procedure indicated below will be followed:

(1) Form No. 1029 A and B will be completed as a rejection "Account Cancellation of Call under President's order of November 11, 1918," and forwarded to the appropriate local Board and the Provost Marshal General in the usual manner.

(2) The Original of Form No. 1010, P. M. G. O., and Form No. 2017, P. M. G. O., will be forwarded with Form No. 1, P. M. G. O., to the Adjutant General of the Army.

(3) A copy of Form No. 1010, P. M. G. O., will be transmitted to the camp surgeon.

(4) A discharge certificate, on a new blank form (Form No. 638–1, A. G. O.), will be made out by the camp commander and transmitted with the two remaining Forms Nos. 2017, P. M. G. O., to the disbursing quartermaster at the camp or station.

(5) The disbursing officer will use the two copies of Form No. 2017, P. M. G. O., as a statement of final account of the man concerned and will issue a check in settlement thereof in the same manner as in the settlement of final statements.

(6) The discharge certificate will be indorsed by the disbursing officer as to final settlement and will then be mailed, with check for amount due, to the man concerned at the address given.

(324.71, A. G. O.)

BY ORDER OF THE SECRETARY OF WAR:

PEYTON C. MARCH,
General, Chief of Staff.

Official:

P. C. HARRIS,
The Adjutant General.

6a. The following is the front of Form No. 638, A. G. O., edition of March 16, 1918:

DISCHARGE FROM DRAFT

[Seal]

TO ALL WHOM IT MAY CONCERN

This is to Certify, That_____
_____ is hereby DISCHARGED from the military service of the UNITED STATES by reason of_____

_____

_____

Said _____
was inducted into the service from the jurisdiction of the *Local Board for _____, *Adjutant General, State of _____, on the _____ day of _____, 191 .

While this certificate discharges the person named herein from his present obligation to serve in the Army, it does not operate as a permanent bar to his subsequent entrance into the military service. Under Section 5 of the Act of May 18, 1917, all registered persons remain subject to the draft unless exempted or excused as in that Act provided. Therefore, this discharge does not excuse the holder from obedience to the process of Exemption Boards.

Given at _____, this _____ day of _____, 191 .

By {command / order} of _____

_____
Adjutant.

*Strike out words not applicable.

NOTE.—This form will be used for discharge of aliens and alien enemies and of men rejected on account of physical unfitness, dependency, etc.

Form No. 638, A. G. O.
Ed. Mar. 6-18-100,000.

6b. The following is the back of Form No. 638, A. G. O., edition of March 6, 1918:

ACT OF MAY 18, 1917

SEC. 5. That all male persons between the ages of twenty-one and thirty, both in-

clusive, shall be subject to registration in accordance with regulations to be prescribed by the President; and upon proclamation by the President or other public notice given by him or by his direction stating the time and place of such registration it shall be the duty of all persons of the designated ages, except officers and enlisted men of the Regular Army, the Navy, and the National Guard and Naval Militia while in the service of the United States, to present themselves for and submit to registration under the provisions of this act; and every such person shall be deemed to have notice of the requirements of this act upon the publication of said proclamation or other notice as aforesaid given by the President or by his direction; and any person who shall willfully fail or refuse to present himself for registration or to submit thereto as herein provided, shall be guilty of a disdemeanor and shall, upon conviction in the district court of the United States having jurisdiction thereof, be punished by imprisonment for not more than one year, and shall thereupon be duly registered: *Provided,* That in the call of the docket precedence shall be given, in courts trying the same, to the trial of criminal proceedings under this act: *Provided further,* That persons shall be subject to registration as herein provided who shall have attained their twenty-first birthday and who shall not have attained their thirty-first birthday on or before the day set for the registration, and all persons so registered shall be and remain subject to draft into the forces hereby authorized,

unless exempted or excused therefrom as in this act provided: *Provided further,* That in the case of temporary absence from actual place of legal residence of any person liable to registration as provided herein such registration may be made by mail under regulations to be prescribed by the President.

Section 177, Selective Service Regulations

Disposition of men rejected or discharged from military service at mobilization camp

When any selected man is rejected or discharged at a mobilization camp, the commanding officer thereof will promptly notify his Local Board of the fact, cause, and date of rejection or discharge, using Form 1029.

If the rejection or discharge is on account of the fact that the registrant is an alien, or an alien enemy, or that he is physically disqualified for general military service, the Local Board shall place the registrant forthwith in Class V. If the discharge or rejection is on account of dependency or any other cause for deferred clasification prescribed by these regulations, the Local Board shall proceed to reclassify the registrant in accordance with his status as determined by the action of the military authorities in discharging him.

7a. The front of an Honorable Discharge from the Army, in force at the end of 1918, was as follows:

HONORABLE DISCHARGE FROM THE UNITED STATES ARMY

[Seal]

TO ALL WHOM IT MAY CONCERN:

This is to Certify, That*_____
†_____
THE UNITED STATES ARMY, as a Testimonial of Honest and Faithful Service, is hereby Honorably Discharged from the military service of the United States by reason of ‡_____

Said _____ was born in _____, in the State of _____ When enlisted he was _____ years of age and by occupation a _____ He had _____ eyes, _____ hair, _____ complexion, and was _____ feet _____ inches in height.

Given under my hand at _____ this _____ day of _____, one thousand nine hundred and _____.

_____
_____
Commanding.

†Insert Army serial number, grade, company and regiment or arm or corps or department: e. g., "1,620,302"; "Corporal, Company A, 1st Infantry"; "Sergeant, Quartermaster Corps"; "Sergeant, First Class, Medical Department."

‡If discharged prior to expiration of service, give number, date, and source of order or full description of authority therefor.

Form No. 525, A. G. O.
Oct. 9–18.

7b. The back of the Honorable Discharge form, in force at the end of 1918, was as follows:

Enlistment Record

Name:_____ Grade:_____
Enlisted, or Inducted, _____, 191__,
at _____
Serving in _____ enlistment
at date of discharge.
Prior service:*_____
_____
Noncommissioned officer:_____
Marksmanship, gunner qualification or
rating:† _____
Horsemanship: _____
Battles, engagements, skirmishes, expeditions: _____
_____
_____
Knowledge of any vocation:_____
Wounds received in service:_____
Physical condition when discharged:_____
Typhoid prophylaxis completed:_____
Married or single:_____
Character: _____
Remarks: _____
_____
_____
_____
Signature of soldier:_____
_____
_____
Commanding_____

*Give company and regiment or corps or department, with inclusive dates of service in each enlistment.

†Give date of qualification or rating and number, date, and source of order announcing same.

8a. The front of a blue Discharge from the Army, in force at the end of 1918, was as follows:

DISCHARGE FROM THE UNITED STATES ARMY

TO ALL WHOM IT MAY CONCERN:

THIS IS TO CERTIFY, That*_____

†_____

THE UNITED STATES ARMY is hereby DISCHARGED from the military service of the UNITED STATES by reason of ‡_____

_____

_____

Said_____ was born in _____, in the State of _____

When enlisted he was _____ years of age and by occupation a _____

He had _____ eyes, _____ hair, _____ complexion, and was_____ feet _____ inches in height.

Given under my hand at_____ this _____ day of _____, one thousand nine hundred and _____.

_____

_____

Commanding.

---

*Insert name—Christian name first; e. g., "John Doe."

†Insert Army serial number, grade, company, and regiment, or arm of corps or department; e. g., "1620302," "Corporal, Company A, 1st Infantry;" "Sergeant, Quartermaster Corps;" "Sergeant, First Class, Medical Department."

‡State fully actual cause of discharge, giving number, date, and source of order or full description of authority therefor.

Form No. 526, A. G. O.
Oct. 9, 1918.

8b. The back of the blue discharge form, in force at the end of 1918, was identical with the back of the Honorable Discharge form, *supra,* item 7b, p. 73, except that, after the line for the soldier's signature and above the line for the commanding officer's signature, there are inserted, at the left, the words, **"Is not recommended for reenlistment."**

U. S. GOVERNMENT PRINTING OFFICE: 1948

FILE COPY

AUG 6 1946

No. 229

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

ROBERT P. PATTERSON, SECRETARY OF WAR, AND EDWARD F. WITSELL, THE ADJUTANT GENERAL, UNITED STATES ARMY, *Petitioners*,

v.

JAMES JOHN LAMB

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia

BRIEF FOR THE RESPONDENT IN OPPOSITION

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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JAMES JOHN LAMB

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia

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BRIEF FOR THE RESPONDENT IN OPPOSITION

Opinion Below

The District Court did not render an opinion. The opinion of the Court of Appeals (R. 22-28) is reported at 154 F.(2d) 319.

Jurisdiction

The judgment of the Court of Appeals was entered on March 25, 1946, (R. 29). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

Question Presented

Whether a court may, by mandatory injunction, direct the Secretary of War and The Adjutant General to issue to a soldier a discharge certificate that is in accordance with the facts, and with the Army regulations existing at the time of the soldier's discharge.

Statutes and Regulations Involved

The pertinent portions of the statute and regulations involved are set out in the Appendix to the petitioners' brief, pp. 20-25.

Statement

The respondent filed suit in the District Court of the United States for the District of Columbia to obtain a judicial ruling that he was an honorably discharged soldier of World War I, and a mandatory direction to the predecessors of the petitioners to issue to him a certificate of honorable discharge as such. The District Court granted a motion to dismiss on the ground that the complaint failed to state a cause of action on which relief could be granted. The United States Court of Appeals reversed the judgment of the District Court.

The facts, alleged in the complaint and admitted by the motion to dismiss, are these:

The respondent, James John Lamb, a resident of Davenport, Iowa, was notified on November 9, 1918, by his local draft board that he had been selected for immediate military service. He was ordered to report to the board at 9:00 a.m. on November 11 for military duty. The notice which he received informed Lamb that "from and after the day and hour just named you will be a soldier in the military service of the United States". (R. 13) The respondent reported at the designated time and place and was then notified orally by the local board that he was a soldier in the Army of the United States. By a written warrant of ap-

pointment, he was made the leader and special police officer of a contingent of drafted men during the journey from Davenport to Camp Dodge. (R. 14) Pursuant to an oral order given to him later on the morning of November 11, Lamb assembled his contingent and proceeded with it from the office of the local board for the purpose of entraining for the camp.

Before the respondent had actually boarded a train, however, he was told orally that because of the armistice with Germany draft calls had been cancelled. But he was also told that he was still a soldier, subject to military orders and to laws and regulations governing the army, and that he must hold himself in readiness at all times to obey further orders.

On November 15, 1918, Lamb received by mail from his local board a notice that by order of the Provost Marshal General, acting under the instructions of the President, all orders of induction into the Army had been cancelled and that all registrants who were inducted into the Army, but not entrained, were discharged from the Army, *and that the cancellation of such induction orders in cases of registrants who were inducted had the effect of an honorable discharge from the Army.* (R. 15) This action was taken by the local board pursuant to an order of the President, issued through the Provost Marshal General, dated November 11, 1918, which contained the following language (R. 16):

> The President further directs that all registrants who are already inducted into the Army under these calls because of the fact that the day and hour specified in form ten twenty-eight or entered in column twenty-four of the classification list have arrived, but who have not been actually entrained for a mobilization camp, shall be, and that they are hereby, discharged from the Army.

On or about January 26, 1919, Lamb received a certificate styled "Discharge from Draft" which had been issued at

and mailed from Camp Dodge and which was dated as of November 14, 1918. (R. 17) Accompanying it was a Quartermaster's check for $4.00 bearing the notation "Final Pay", which was in payment for service with the army for the period from November 11, 1918, to November 14, 1918, both dates inclusive. (R. 19) From that time on Lamb represented himself as having been honorably discharged from the Army of the United States.

The complaint alleged (Paragraph 15, R. 6), and the motion to dismiss admitted, that the respondent's army service was honest and faithful and his conduct was such to warrant his reenlistment.

A statute of Iowa grants tax exemption on "the property not to exceed Five Hundred Dollars in actual value of any honorably discharged soldier, sailor, marine or nurse of the War with Germany." After the enactment of this exemption Lamb annually applied to the taxing authorities of Scott County, Iowa, the place of his residence, for exemption thereunder, and until the year 1940 each annual application was granted by those authorities. But when he presented his verified claim for the statutory exemption for the year 1941, the Board of Supervisors of Scott County claimed that he had not been a soldier, that he had not been honorably discharged from the army, and that his status was merely that of one who had been discharged from the draft.

Immediately following this occurrence, Lamb sued the members of the Board of Supervisors in the state court at Davenport, alleging that he was an honorably discharged soldier of the war with Germany and that the supervisors had acted illegally in denying him the tax exemption. He prayed that the court declare him to have been honorably discharged and, therefore, entitled to the tax exemption. In May 1942 the Scott County District Court adjudged that "James J. Lamb is an honorably discharged soldier of the War with Germany which frequently is called World War I." Thereafter the Board of Supervisors appealed to the

Supreme Court of Iowa and on March 9, 1943, that court reversed, a majority and a dissenting opinion being filed. In the course of the majority opinion it was said, "we feel there is a serious doubt upon the question whether the appellee in an honorably discharged soldier of the War with Germany within the meaning of section 6946, Code of Iowa 1939". A rehearing was denied on June 15, 1943.

On November 2, 1943, the respondent applied to The Adjutant General of the United States Army for a certificate of honorable discharge. The request was denied on November 20, 1943. Lamb endeavored to get The Adjutant General to reconsider, but that official finally informed him on February 29, 1944, that he adhered to his original denial of the claim. Lamb then filed suit in the District Court of the United States for the District of Columbia against Henry L. Stimson, then Secretary of War, and J. A. Ulio, then The Adjutant General of the United States Army. In his complaint he recited in detail the facts which we have summarized, and prayed that the court declare that he had been a soldier in the Army of the United States from November 11, 1918, to November 14, 1918, both dates inclusive, and that during that period his conduct was such as to warrant his reenlistment in the army and that his service was honest and faithful; that he was not rejected because of physical unfitness; that he is an honorably discharged soldier of the war with Germany and that he is entitled to a certificate showing that his service in the army was honest and faithful; and that he was honorably discharged from military service by reason of the order of the President, dated November 11, 1918. He further prayed that the court mandatorily direct the defendants to issue to him "a proper and lawful discharge from the Army of the United States as by law provided * * *"

The Court of Appeals held that the discharge from draft certificate issued to the respondent was not authorized by regulations in force on the date of the respondent's dis-

charge; that under the existing regulations and the admitted facts the respondent was entitled to a certificate of honorable discharge; that the duty of the authorities to issue to him such a certificate was merely ministerial; and that the claim of the respondent was not barred by laches.

Argument

1. The form of discharge certificate issued to respondent was not authorized by the regulations in force on the date of his discharge.

The petitioners argue that Circular No. 651, promulgated by the War Department on January 12, 1918, authorized the certificate of discharge from draft issued to the respondent (Petitioners' Brief, pp. 10-12; Petitioners' Appendix, pp. 21-22). This argument is clearly unsound, since Circular No. 651 related only to men who were *rejected*, whereas upon the admitted facts the respondent was not rejected but was in every respect qualified for military service. (Complaint, Paragraph 15, R. 6) Indeed the petitioners in the court below did not rely upon Circular No. 651 as authority for the certificate issued to the respondent; on the contrary the petitioners argued that this form of discharge had been authorized by Circular No. 111, dated December 4, 1918. Significantly, Circular No. 111 refers to the certificate of discharge from draft, Form No. 638-1 AGO, which was issued to the respondent, as a "*new blank form*" (Petitioners' Appendix, pp. 22-23).

It is plain that the issuance of a discharge certificate to the respondent was governed only by paragraph 150 of the Army Regulations, which provided that a certificate of honorable discharge should be issued when the soldier's conduct had been such as to warrant his reenlistment and his service had been honest and faithful (Petitioners' Appendix, pp. 20-21).

As the complaint alleged (Paragraph 15, R. 6), and the motion to dismiss admitted, the service of the respondent

was honest and faithful and his conduct was such as to warrant his reenlistment.

2. The petitioners were under a ministerial duty to issue to the respondent a certificate of honorable discharge.

As the Court of Appeals said (R. 25-26):

> It must be conceded that the determination originally of the several forms of certificates of discharge was a proper exercise of the executive authority of the Secretary; but, having exercised that authority and having defined the three types of certificates to be issued, and having by regulation established standards to govern the selection of the proper form to be issued to each discharged soldier, the executive authority of the Secretary had been fully exercised, and the duty of the army officer at Camp Dodge in issuing a certificate of discharge to the appellant was simply ministerial, as though the regulation had been a statute. That officer did not have, and indeed the Secretary himself would not have had, the right arbitrarily to issue to Lamb any form of discharge certificate other than that which was appropriate to his status according to the standards set up in paragraph 150 of the Army Regulations. True it is that the Secretary again could exercise his executive authority to provide for additional and different forms of discharge, as he did by the regulations of January 12, 1918, and again on December 4, 1918; but, once standards are erected by regulation, it is merely ministerial to observe them. Consequently, it is incorrect to say, as the appellees do, that whether the appellant is entitled to a certificate of honorable discharge rests in the sound discretion of the Secretary of War.
>
> The court does not substiute its judgment for that of the Secretary as to the quality of appellant's service and his character as exhibited during that service. The Secretary determined, by paragraph 150 of the Army Regulations, that the blank for honorable discharge must be used "when the soldier's conduct has been such as to warrant his reenlistment and his service has been honest and faithful." The appellant's

complaint, against which the appellees' motion to dismiss was leveled, alleges that the appellant's conduct was such as to warrant his reenlistment and that his service had been honest and faithful. The motion to dismiss has the effect of admitting these facts. So, for the purpose of considering the motion to dismiss, it is the Secretary's considered judgment, expressed in paragraph 150, that Lamb is entitled to an honorable discharge.

The argument of the petitioners, that their discretion in issuing discharge certificates is completely unfettered, leads to dangerous results. If this argument be sound, then the petitioners may issue a certificate of dishonorable discharge to a soldier whose service has admittedly been in all respects honorable, and the soldier has no recourse. Indeed, it logically follows from the argument of the petitioners that they may revoke any honorable discharge certificate heretofore issued, and substitute therefor a new and different certificate in accordance with their whim of the moment. The effect of the decision of the Court of Appeals is only to require the military authorities to act in accordance with law. Certainly the military, like all others in authority, should be subject to law; if they are not, then our government has become a military autocracy.

3. The decision of the Court of Appeals is not in conflict with Palmer v. United States, 72 C. Cls. 401, or any other case.

In *Palmer* v. *United States*, 72 C. Cls. 401, the plaintiff contended that he had not been discharged from the Coast Guard by "proper authority" and that he was, therefore, entitled to recover certain pay and allowances. The basis of his contention was that prior to his discharge he had not received a medical examination or survey in accordance with procedural instructions contained in a Coast Guard circular letter. No question was raised as to the kind or character of his discharge certificate. In other words the

Palmer case involved only the mechanical procedure which led up to the discharge, and the case had nothing to do with the substantive right of an enlisted man to receive a particular type of discharge. It is obvious, therefore, that the case is not apposite here.

The Court of Appeals in its opinion correctly distinguished *Reid* v. *United States*, 161 Fed. 469. We may add that in that case the type of discharge issued to Reid was provided for by existing Army Regulations, and the Court properly refused to interfere with the exercise of the executive discretion *within the limits of the regulations*. The case can have no application here where the executive upon admitted facts has acted in violation of existing regulations.

The decision of the Court of Appeals is supported by *Davis* v. *Woodring*, 72 App. D. C. 83, 111 F. (2d) 523. That case was an action by Davis against the Secretary of War for mandamus to require the Secretary to issue to petitioner a certificate of honorable discharge from the Army or for a declaratory judgment that petitioner was lawfully inducted into the military service of the United States and was entitled to an honorable discharge certificate. It appeared that Davis had received a certificate of discharge from draft as a "rejected man" under the provisions of War Department Circular No. 651, dated January 12, 1918. The Court of Appeals held that under Paragraph 150 of the Army Regulations Davis would have been entitled to an honorable discharge; but the Court held that these regulations had been properly amended by War Department Circular No. 651, which applied to Davis. After quoting the provisions of Paragraph 150 of the Army Regulations, the Court said:

> *If this were all, we should be obliged to say that petitioner should have been given an honorable discharge, since admittedly his "conduct" warranted his reenlistment, and his service was honest and faithful.* But after our entry into the war and the passage of legislation creating a national army through the Selec-

tive Draft Act, the Secretary of War, under date of January 12, 1918, issued an order to mustering officers and others attached to mobilization camps, requiring them to make and forward records of accepted and rejected men on prescribed forms. Under the title "Disposition of Rejected Men", there is to be found a provision that men "discharged from draft" shall be furnished a certificate of discharge on Form No. 638, A. G. O., which is the form furnished to petitioner in this case.

* * * * * * * * * *

If, therefore, we are correct in thinking that the Secretary's January 12th order, amending the former regulations in respect to the form of discharges, was within his power, it follows that what petitioner received in this case—*being in accordance with existing regulations and also in accordance with the actual facts*—was all that he could lawfully demand. (Italics supplied.)

It is, therefore, plain that had Paragraph 150 of the Army Regulations not been modified by the order of January 12, 1918 (War Department Circular No. 651), *relating to rejected men and applicable to Davis*, the Court of Appeals would have held that Davis was entitled to an honorable discharge, and the Court would have directed the authorities to issue such a discharge to him.

4. The respondent was not guilty of laches.

The Court below fully answered the contention of the petitioners that the respondent's claim was barred by laches. The Court said:

Twenty-five years elapsed from the time appellant received his discharge certificate until he first attempted to obtain a certificate of honorable discharge, as the appellees pointed out. But laches is not like limitation, a mere matter of time. Although the appellant was discharged on November 14, 1918, and received a certificate of Discharge from Draft on January 26, 1919, he was told on November 15, 1918, by his local board that the Presidential order of November

11, 1918, discharging from the army all registrants who had been inducted but not entrained, had "the effect of an honorable discharge from the army." Until 1941, the appellant had no basis for supposing that there was any doubt concerning his status as an honorably discharged soldier. When that status was challenged for the first time, he manifested extraordinary diligence in asserting his rights. Moreover, the appellees do not claim that there has been any change of condition or relations since 1918 because of which it would be an injustice to them to permit the appellant to assert his rights now. Bearing in mind the essential elements of laches, it is our opinion that the appellants action is not barred by that defense.

5. Petitioners apparently argue that since the War Department has repeated in approximately 56,000 other cases the error which it committed in the case of Lamb, the Department's error has become too enormous to be corrected (Petitioners' Brief, p. 18).

In other words, Lamb must lose his right and his remedy because it would be inconvenient for the War Department to do him justice. We think that such an argument needs no answer. The case of the respondent should be judged according to its individual merits. The fact is, however, that few of the 56,000 indivduals, who according to the War Department received discharges from draft, will ever undergo the trouble and expense necessary to extract a proper discharge from the War Department; and that fewer still will be able to show that they have not been guilty of laches.

Similarly, the case of the respondent should not be prejudiced by statements of the War Department as to any alleged inequity to men who were rejected at mobilization camps (Petitioners' Brief, p. 18). The respondent was not rejected but was in every way qualified for military service, and he did in fact serve, and was ready and able to continue to serve. There are clearly reasonable grounds to distinguish between men in the situation of the respon-

dent, and men who were rejected as unfit for military service. In any event, the War Department made special provision for the issuance of discharge certificates to men who were rejected, but the Department made no such provision for the respondent and others in his situation.

Conclusion

The decision below is clearly correct. There is no conflict. The petition for a writ of certiorari should, therefore, be denied.

Respectfully submitted,

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No. 229

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v.

JAMES JOHN LAMB

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia

BRIEF FOR THE RESPONDENT

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December 30, 1946

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. 229

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v.

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BRIEF FOR THE RESPONDENT

OPINION BELOW

The District Court of the United States for the District of Columbia did not render an opinion. The opinion of the United States Court of Appeals for the District of Columbia (R. 22-29) is reported at 154 F. (2d) 319.

JURISDICTION

The judgment of the Court of Appeals was entered on March 25, 1946 (R. 29). The petition for a writ of certiorari was filed on June 24, 1946, and was granted October 14, 1946 (R. 33). The jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether a court may, by mandatory injunction, direct the Secretary of War and The Adjutant General to issue to a discharged soldier a discharge certificate that is in accordance with the facts, and with the Army Regulations existing at the time of the soldier's discharge.

STATUTES AND REGULATIONS INVOLVED

The pertinent portions of the statutes, Army Regulations, and discharge certificates involved are set out in the Appendix to the petitioners' brief, pp. 58-75.

STATEMENT

The respondent filed suit in the District Court of the United States for the District of Columbia to obtain a judicial ruling that he was an honorably discharged soldier of World War I, and a mandatory direction to the predecessors of the petitioners to issue to him a certificate of honorable discharge as such. The District Court granted a motion to dismiss on the ground that the complaint failed to state a cause of action on which relief could be granted. The United States Court of Appeals reversed the judgment of the District Court.

The facts, alleged in the complaint and admitted by the motion to dismiss, are these:

The respondent, James John Lamb, a resident of Davenport, Iowa, was notified on November 9, 1918, by his local draft board that he had been selected for immediate mili-

tary service. He was ordered to report to the board at 9:00 a. m. on November 11 for military duty. The notice which he received informed Lamb that "from and after the day and hour just named you will be a soldier in the military service of the United States". (R. 13) The respondent reported at the designated time and place and was then notified orally by the local board that he was a soldier in the Army of the United States. By a written warrant of appointment, he was made the leader and special police officer of a contingent of drafted men during the journey from Davenport to Camp Dodge. (R. 14). Pursuant to an oral order given to him later on the morning of November 11, Lamb assembled his contingent and proceeded with it from the office of the local board for the purpose of entraining for the camp.

Before the respondent had actually boarded a train, however, he was told orally that because of the armistice with Germany draft calls had been cancelled. But he was also told that he was still a soldier, subject to military orders and to laws and regulations governing the army, and that he must hold himself in readiness at all times to obey further orders.

On November 15, 1918, Lamb received by mail from his local board a notice that by order of the Provost Marshal General, acting under the instructions of the President, all orders of induction into the Army had been cancelled and that all registrants who were inducted into the Army, but not entrained, *were discharged from the Army, and that the cancellation of such induction orders in cases of registrants who were inducted had the effect of an honorable discharge from the Army.* (R. 15) This action was taken by the local board pursuant to an order of the President, issued through the Provost Marshal General, dated November 11, 1918, which contained the following language (R. 16):

> The President further directs that all registrants who are already *inducted into the Army* under these

> calls because of the fact that the day and hour specified in form ten twenty-eight or entered in column twenty-four of the classification list have arrived, but who have not been actually entrained for a mobilization camp, shall be, and that they are hereby, *discharged from the Army.* (Emphasis ours)

On or about January 26, 1919, Lamb received a certificate styled "Discharge from Draft" which had been issued at and mailed from Camp Dodge and which was dated as of November 14, 1918. (R. 17) Accompanying it was a Quartermaster's check for $4.00 bearing the notation "Final Pay", which was in payment for service with the army for the period from November 11, 1918, to November 14, 1918, both dates inclusive. (R. 19) From that time on Lamb represented himself as having been honorably discharged from the Army of the United States.

The complaint alleged (Paragraph 15, R. 6), and the motion to dismiss admitted, that the respondent's army service was honest and faithful and his conduct was such to warrant his reenlistment.

A statute of Iowa grants tax exemption on "the property not to exceed Five Hundred Dollars in actual value of any honorably discharged soldier, sailor, marine or nurse of the War with Germany." After the enactment of this exemption Lamb annually applied to the taxing authorities of Scott County, Iowa, the place of his residence, for exemption thereunder, and until the year 1940 each annual application was granted by those authorities. But when he presented his verified claim for the statutory exemption for the year 1941, the Board of Supervisors of Scott County claimed that he had not been a soldier, that he had not been honorably discharged from the army, and that his status was merely that of one who had been discharged from the draft.

Immediately following this occurrence, Lamb sued the members of the Board of Supervisors in the state court at Davenport, alleging that he was an honorably discharged

soldier of the war with Germany and that the supervisors had acted illegally in denying him the tax exemption. He prayed that the court declare him to have been honorably discharged and, therefore, entitled to the tax exemption. In May 1942 the Scott County District Court adjudged that "James J. Lamb is an honorably discharged soldier of the War with Germany which frequently is called World War I." Thereafter the Board of Supervisors appealed to the Supreme Court of Iowa and on March 9, 1943, that court reversed, a majority and a dissenting opinion being filed. In the course of the majority opinion it was said, "we feel there is a serious doubt upon the question whether the appellee in an honorably discharged soldier of the War with Germany within the meaning of section 6946, Code of Iowa 1939". A rehearing was denied on June 15, 1943.

On November 2, 1943, the respondent applied to The Adjutant General of the United States Army for a certificate of honorable discharge. The request was denied on November 20, 1943. Lamb endeavored to get The Adjutant General to reconsider, but that official finally informed him on February 29, 1944, that he adhered to his original denial of th claim. Lamb then filed suit in the District Court of the United States for the District of Columbia against Henry L. Stimson, then Secretary of War, and J. A. Ulio, then The Adjutant General of the United States Army. In his complaint he recited in detail the facts which we have summarized, and prayed that the court declare that he had been a soldier in the Army of the United States from November 11, 1918, to November 14, 1918, both dates inclusive, and that during that period his conduct was such as to warrant his reenlistment in the army and that his service was honest and faithful; that he was not rejected because of physical unfitness; that he is an honorably discharged soldier of the war with Germany and that he is entitled to a certificate showing that his service in the army was honest and faithful; and that he was honorably discharged from military service by reason of the order of the President,

dated November 11, 1918. He further prayed that the court mandatorily direct the defendants to issue to him "a proper and lawful discharge from the Army of the United States as by law provided * * *."

The Court of Appeals held that the discharge from draft certificate issued to the respondent was not authorized by regulations in force on the date of the respondent's discharge; that under the existing regulations and upon the admitted facts the respondent was entitled to a certificate of honorable discharge; that the duty of the authorities to issue to him such a certificate was merely ministerial; and that the claim of the respondent was not barred by laches.

SUMMARY OF ARGUMENT

1. The discharge of the respondent was governed by Paragraph 150 of the Army Regulations of 1913, as corrected to April 15, 1917. This was the only regulation applicable to the respondent's discharge on the date when he was discharged, November 14, 1918. There was no regulation authorizing the certificate of discharge from draft issued to the respondent. War Department Circular No. 651, promulgated January 12, 1918, upon which the petitioners rely as authority for the certificate of discharge from draft issued to the respondent, related *only* to men who were *rejected*, whereas upon the admitted facts the respondent was not rejected but was in every respect qualified for military service, and he did in fact serve.

   a. The respondent was a soldier in the Army of the United States, to whose discharge Paragraph 150 of the Regulations applied. That he served as a soldier in the Army is admitted as a fact by the pleadings; and he was a soldier in the Army as a matter of law.

2. Paragraph 150 of the Army Regulations required that a certificate of honorable discharge be issued to a soldier whose service had been honest and faithful, and whose con-

duct had been such as to warant his reenlistment. The petitioners admit that the service of the respondent was honest and faithful and that his conduct was such as to warrant his reenlishment. Upon the admitted facts, therefore, the petitioners are under a ministerial duty to issue to the respondent a certificate of honorable discharge. To compel the performance by the petitioners of this ministerial duty is not to interfere with the exercise of their discretion in the management of the Army, but only to require them to obey the law. The argument of the petitioners, and the cases cited by them in support of the proposition that a court will not interfere with the military authorities in the exercise of their discretion, are not in point; for here under the regulations and upon the admitted facts the petitioners had no discretion.

3. The remedy of the respondent has not been barred by laches. He has been diligent in asserting his rights and the petitioners have in no way been prejudiced by any delay.

ARGUMENT

1. The discharge of the respondent was governed by Paragraph 150 of the Army Regulations of 1913, as corrected to April 15, 1917; and on November 14, 1918, when the respondent was discharged, there was no regulation authorizing the certificate of discharge from draft issued to him.

Paragraph 150 of the Army Regulations of 1913, as corrected to April 15, 1917 (Petitioners' Appendix, pp. 61-62) divided discharge certificates into three classes, and provided that:

> They will be used as follows:
>
> 1. The blank for honorable discharge, when the soldier's conduct has been such as to warrant his reenlistment and his service has been honest and faithful.

2. The blank for dishonorable discharge, for dishonorable discharge by sentence of a court martial or a military commission.

3. The blank for discharge when the soldier is discharged except as specified under sections 1 and 2 of this paragraph (C. A. R. Nos. 14 and 34).

The complaint alleged (Paragraph 15, R. 6) that the respondent "served as a soldier in the Army of the United States from November 11, 1918 to November 14, 1918, both dates inclusive, and that his said service was honest and faithful and his conduct was such as to warrant his reenlistment". These facts being admitted by the motion to dismiss, as they were, it follows that Paragraph 150 of the Army Regulations required the issuance of a certificate of honorable discharge to the respondent. The petitioners contend, however, that the respondent's discharge was not governed by Paragraph 150, but rather by an amendment to the Regulations promulgated on January 12, 1918, as War Department Circular No. 651; and that War Department Circular No. 651 authorized the certificate of discharge from draft issued to the respondent. We think it clear that this circular had no application to the discharge of the respondent.

War Department Circular No. 651, set out in full in the Appendix to the petitioners' brief, pp. 62-66, provided, under the heading "Disposition of rejected men", that

> All men rejected for military service at place of mobilization will be furnished the following:
>
> "(a) A discharge from draft on Form No. 638, A. G. O. (Petitioners' Appendix, p. 63)

Form No. 638, A. G. O. (reproduced in the Appendix to the petitioners' brief, pp. 68-71), bore on its face the statement: "Note.—This form will be used for discharge of aliens and alien enemies and of men rejected on account of physical unfitness, dependency, etc." This note and the inclusive "etc." obviously referred to Section 177 of the

Selective Service Regulations, relating to rejected men, which was printed on the back of Form 638 A. G. O. and which listed the causes for rejection specified in the note, together with "any other cause for deferred classification prescribed by these regulations".

It is apparent that War Department Circular 651 was not applicable to the discharge of the respondent. That circular related only to rejected men. The complaint alleged (Paragraph 15, R. 6) and the motion to dismiss admitted that the respondent was never rejected, but was in every respect qualified for service, that he did serve, and "that he was discharged from the Army solely because of the signing of the Armistice between the United States and Germany".

Our conclusion that Circular No. 651 did not apply to the respondent's discharge is supported by the fact that on December 4, 1918—subsequent to the discharge—the War Department issued Circular No. 111 (Petitioners' Appendix, p. 66), which authorized Form No. 638-1, A. G. O., the form of discharge from draft certificate issued to the respondent. Significantly, Circular No. 111 refers to Form No. 638-1, A. G. O., as "a new blank form". (Petitioners' Appendix, p. 68). As the court below properly held, this regulation did not and could not apply to the case of a soldier who had already been discharged.

The petitioners say in their brief (p. 22), "The court below concluded (R. 26) that Form 638-1 depended for its validity on Circular No. 111 of December 4, 1918. But this was clearly erroneous * * *." As the opinion of the Court of Appeals shows, however, and as the petitioners cannot deny, *the petitioners themselves rested their case below upon Circular No. 111; not until they reached this Court did they rely upon Circular No. 651 as authority for the certificate issued to the respondent.*

a. *The respondent was a soldier in the Army of the United States, so that his discharge was governed by Paragraph 150 of the Regulations.* The written order of induction (R. 13) officially informed the respondent that from

the moment of induction he was "a soldier in the military service of the United States." The complaint (Paragraphs 14, 15, R. 6) alleged further that he "served as a soldier in the Army of the United States from November 11, 1918 to November 14, 1918, both dates inclusive * * *; that he was discharged from the Army", and that he was paid by the Quartermaster "for his services with the Army * * * at the rate of pay then prevailing for * * * enlisted men". The motion to dismiss admitted that these allegations were true. It was also admitted that the respondent was discharged from the Army by order of the President, transmitted in writing through the Provost Marshal General, and directing that the respondent be "discharged from the Army" (Complaint, paragraph 12, R. 5; Exhibit D, R. 16); and that the respondent was duly notified in writing by the draft authorities that he was "discharged from the army" and that this discharge had "the effect of an honorable discharge from the army" (Complaint, paragraph 11, R. 5; Exhibit C, R. 15). In short, the respondent served as a soldier in the Army, was paid by the Army for his services as a soldier, was discharged from the Army, and was told that he had been discharged from the Army. In the face of these facts the petitioners now concede that as a matter of law the respondent entered into the "military service" and became subject to military orders and the Articles of War (Petitioners' Brief, pp. 16-18); yet the petitioners now argue that the respondent was "never in the Army" (Petitioners' Brief, pp. 7, 8, 18, 22, 23, 26, 27, 29). From their premise that the respondent was never in the Army the petitioners conclude that his discharge was not subject to Paragraph 150 of the Army Regulations governing the discharge of soldiers; in other words the petitioners say that the respondent's fulfillment of the requirements of Paragraph 150, by honest and faithful service and meritorious conduct, could not entitle him to an honorable discharge. We are at a loss to understand the petitioners' argument. If the respondent was not in the Army, then where was he and what was his status? If he was not a soldier, do the petitioners say that he was a civilian? And do the peti-

tioners now undertake to deny the facts which they admitted by their motion to dismiss? We submit that it is perfectly plain that the respondent was a soldier in the Army, and that his discharge was therefore governed by Paragraph 150 of the Army Regulations.

The petitioners argue that because a soldier after his induction might have been discharged or "rejected" pursuant to Circular No. 651, it follows that such a man was never "in the Army". The argument involves a *non-sequitur*. The fact that the man was "in the Army" when inducted was not altered by the possibility of his subsequent release from service. In any event the respondent was never discharged or rejected pursuant to Circular No. 651, nor did any ground for such discharge or rejection exist in his case.

2. The petitioners are under a ministerial duty to issue to the respondent a certificate of honorable discharge.

As we have demonstrated, the discharge of the respondent was governed by Paragraph 150 of the Army Regulations. Paragraph 150 required that an honorable discharge be issued when the soldier's conduct had been such as to warrant his reenlistment and his service had been honest and faithful (Appendix to Petitioners' Brief, pp. 61, 62). The complaint alleged and the motion to dismiss admitted that the respondent "served as a soldier in the Army of the United States from November 11, 1918 to November 14, 1918, both dates inclusive, and that his said service was honest and faithful and his conduct was such as to warrant his reenlistment" (R. 6). Upon the admitted facts, therefore, Paragraph 150 of the Regulations required the military authorities to issue to the respondent a certificate of honorable discharge.

The petitioners argue that to compel them to perform their plain ministerial duty under the regulations is to interfere with the exercise of their discretion in the management of the Army. The well-reasoned opinion of the Court

of Appeals (R. 22) demolished this argument. The Court said (R. 26, 27):

> We proceed to the second contention of the appellees which is that the issuance of an honorable discharge certificate is a discretionary act and not subject to control by mandamus. It is urged upon us that it rests in the sound discretion of the Secretary of War whether to issue a certificate of honorable discharge to a soldier separated from the service, and that we should not substitute our judgment for that of the Secretary as to the quality of appellant's service and his character as exhibited during that service.
>
> It must be conceded that the determination originally of the several forms of certificates of discharge was a proper exercise of the executive authority of the Secretary; but, having exercised that authority and having defined the three types of certificates to be issued, and having by regulation established standards to govern the selection of the proper form to be issued to each discharged soldier, the executive authority of the Secretary had been fully exercised, and the duty of the army officer at Camp Dodge in issuing a certificate of discharge to the appellant was simply ministerial, as though the regulation had been a statute.[1] That officer did not have, and indeed the Secretary himself would not have had, the right arbitrarily to issue to Lamb any form of discharge certificate other than that which was appropriate to his status according to the standards set up in paragraph 150 of the Army Regulations. True it is that the Secretary again could exercise his executive authority to provide for additional and different forms of discharge, as he did by the regulations of January 12, 1918, and again on December 4, 1918; but, once standards are erected by regulation, it is merely ministerial to observe them. Consequently, it is incorrect to say, as the appellees do, that whether the appellant is entitled to a certificate of honorable discharge rests in the sound discretion of the Secretary of War.[2]

[1] Citing *Arizona Grocery Co.* v. *A. T. & S. F. Ry. Co.*, 284 U. S. 370, 386.
[2] Citing *Miguel* v. *McCarl*, 291 U. S. 442.

The court does not substitute its judgment for that of the Secretary as to the quality of appellant's service and his character as exhibited during that service. The Secretary determined, by paragraph 150 of the Army Regulations, that the blank for honorable discharge must be used "when the soldier's conduct has been such as to warrant his reenlistment and his service has been honest and faithful." The appellant's complaint, against which the appellees' motion to dismiss was leveled, alleges that the appellant's conduct was such as to warrant his reenlistment and that his service had been honest and faithful. The motion to dismiss has the effect of admitting these facts. So, for the purpose of considering the motion to dismiss, it is the Secretary's considered judgment, expressed in paragraph 150, that Lamb is entitled to an honorable discharge.

Davis v. *Woodring*, 72 App. D. C. 83, 111 F. (2d) 523, is cited by the petitioners in support of their proposition "that since the individual discharged from the military service was not entitled by law to any particular form of discharge, he could not, if dissatisfied with the type of certificate issued to him, resort to the courts for relief" (Petitioners' Brief, pp. 13, 14). That case, however, clearly stands for the proposition that a court will intervene when the certificate of discharge issued to a soldier is not in accordance with the Regulations and with the actual facts. It appeared that Davis had received a certificate of discharge from draft as a "rejected man" under the provisions of War Department Circular No. 651, dated January 12, 1918. The Court of Appeals held that under Paragraph 150 of the Army Regulations Davis would have been entitled to an honorable discharge; but the Court held that these regulations had been properly amended by War Department Circular No. 651, which applied to Davis. After quoting the provisions of Paragraph 150 of the Army Regulations, the Court said:

If this were all, we should be obliged to say that petitioner should have been given an honorable dis-

> *charge, since admittedly his "conduct" warranted his reenlistment, and his service was honest and faithful.* But after our entry into the war and the passage of legislation creating a national army through the Selective Draft Act, the Secretary of War, under date of January 12, 1918, issued an order to mustering officers and others attached to mobilization camps, requiring them to make and forward records of accepted and rejected men on prescribed forms. Under the title "Disposition of Rejected Men", there is to be found a provision that men "discharged from draft" shall be furnished a certificate of discharge on Form No. 638, A. G. O., which is the form furnished to petitioner in this case.
>
> * * * * * * * * *
>
> If, therefore, we are correct in thinking that the Secretary's January 12th order, amending the former regulations in respect to the form of discharges, was within his power, it follows that what petitioner received in this case—*being in accordance with existing regulations and also in accordance with the actual facts*—was all that he could lawfully demand. (Italics supplied.)

It is, therefore, plain that had Paragraph 150 of the Army Regulations not been modified by the order of January 12, 1918 (War Department Circular No. 651), *relating to rejected men and applicable to Davis*, the Court of Appeals would have held that Davis was entitled to an honorable discharge, and the Court would have directed the authorities to issue such a discharge to him.

The argument of the petitioners that a court will not interfere with the military authorities in the exercise of their discretion is not apposite, for here under the Regulations and upon the admitted facts the authorities had no discretion. Similarly the cases cited by the petitioners on this point are wide of the mark, for in those cases the authorities acted within the limits of their discretion. Thus in *Denby* v. *Berry*, 263 U. S. 29 (Petitioners' Brief, pp. 8, 10, 14, 25, 33, 36, 37, 45, 53), the Secretary of the Navy acted

within the plain limits of his discretion in ordering the petitioner to inactive duty. It is true that the petitioner in that case contended that the action of the Secretary was in violation of a Navy Regulation; but this Court disposed of that contention upon the ground that long before the action of the Secretary was taken, the Regulation in question had been stricken from the Navy Regulations and had "lost its statutory force" (263 U. S. 37, 38). We submit that neither that case nor any other decision in the books supports the doctrine that the Secretary of War may violate an existing regulation which has the force of law and may with impunity destroy rights and legal relations which have accrued under that Regulation.

The argument of the petitioners, that they may do as they please in issuing discharge certificates without regard to the Regulations, leads to dangerous results. If this argument be sound, then the petitioners may issue a certificate of dishonorable discharge to a soldier whose service has admittedly been in all respects honorable, and who under the Regulations is entitled to an honorable discharge, and the soldier has no recourse. Indeed, it inevitably follows, from the argument of the petitioners, that they may revoke any honorable discharge certificate heretofore issued, and substitute therefor a new and different certificate in accordance with their whim of the moment. To compel the petitioners to perform their plain ministerial duty in this case is only to require them to obey the law. We submit that the military, like all others in authority, should be subject to law, and that this Court should reject the pernicious doctrine that they are autocrats who may do just as they please.

3. The remedy of the respondent has not been barred by laches.

The complaint showed that the respondent was advised by his local draft board on November 15, 1918, that the cancellation of his induction order after his induction had

"the effect of an honorable discharge from the Army" (Complaint, paragraphs 11, 16, R. 5, 6; Exhibit C, R. 15). The complaint further showed that the order of the President, dated November 11, 1918, pursuant to which the respondent was discharged, stated that the respondent and others in his circumstances were "discharged from the Army" (Exhibit D, paragraph three, R. 16). In honest reliance upon these statements the respondent thereafter represented himself as an honorably discharged soldier and he annually received a tax exemption upon that basis. It was not until 1941 that his local tax authorities questioned the status of the respondent as an honorably discharged soldier. Until this time the respondent had been lulled into the reasonable belief that he had in fact received an honorable discharge; and nothing had occurred to dispel his belief. The complaint showed in detail the steps taken by the respondent to obtain an honorable discharge after discovering that he had been wrongly advised concerning the character of the discharge certificate issued to him (Complaint, paragraphs 16-20, R. 6-9). Without repeating or attempting to summarize these allegations of the complaint, it seems enough to say that they clearly show diligence on the part of the respondent after he learned of the wrong that had been done. See *La Parr* v. *City of Rockford*, 100 F. (2d) 564, 567 (CCA 7); *Des Moines Terminal Company* v. *Des Moines Union Ry. Company*, 52 F. (2d) 616, 630 (CCA 8). Moreover, as the Court of Appeals well said, there is nothing to show that there has been any change of condition or relations since 1918, because of which it would be an injustice to the petitioners to permit the respondent to assert his rights at this time. As this Court said in *Galliher* v. *Cadwell*, 145 U. S. 368, 372, with respect to the defense of laches:

> The cases are many in which this defense has been invoked and considered. It is true, that by reason of their differences of fact no one case becomes an exact precedent for another, yet a uniform principle per-

vades them all. They proceed on the assumption that the party to whom laches is imputed has knowledge of his rights, and an ample opportunity to establish them in a proper forum; that by reason of his delay the adverse party has good reason to believe that the alleged rights are worthless or have been abandoned; and that because of the change in condition or relations during this period of delay, it would be an injustice to the latter to permit him to now assert them.

The petitioners have departed from the record to tell the Court that there are over 45,000 individuals who "would be able to claim very substantial benefits, benefits which Congress up to now had advisedly withheld from them" if the decision below remains undisturbed (Petitioners' Brief, p. 55). Whether there are 45,000 such individuals, and specifically whether they would be able to claim substantial benefits, are issues not presented by this record, issues which we are not required to debate. We think it enough to say that, if the respondent was entitled by law to a certificate of honorable discharge, then he should have it; and if Congress then wishes to provide that he should not enjoy certain financial benefits, then Congress may do so. We may note however that there is no suggestion that the respondent has demanded any benefit from the Government.

The petitioners also suggest that certain congressional enactments, respecting the payment of benefits to holders of certificates of discharge from the draft, recognize and ratify the issuance of such discharges. The flaw in this argument is, of course, that while Congress may have recognized that certificates of discharge from the draft were issued, Congress certainly did not intend to ratify a violation of the law, nor did Congress attempt to say that the military authorities had acted properly and legally in issuing a certificate of discharge from the draft in any individual case. In other words, the case of the respondent must be judged upon its individual merits, upon the ad-

mitted facts and the Regulations as they existed at the moment of his discharge. When the case is judged in this way, it is apparent that the military authorities were required by law to issue to the respondent a certificate of honorable discharge.

CONCLUSION.

In substance the issue presented by this case is whether or not the military authorities may do as they please without regard for the law. We submit that this question should be answered in the negative, and that the decision of the Court below was correct and should be affirmed.

Respectfully submitted,

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December 30, 1946

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SUPREME COURT OF THE UNITED STATES

No. 229.—October Term, 1946.

Robert P. Patterson, Secretary of War, and Edward F. Witsell, The Adjutant General, United States Army, Petitioners,
v.
James John Lamb.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

[January 20, 1947.]

Mr. Justice Black delivered the opinion of the Court.

On October 28, 1944, respondent brought this action in the United States District Court for the District of Columbia against the then Secretary of War and Adjutant General of the Army.[1] He prayed for a judgment declaring that he had served in the United States Army from November 11, 1918 (Armistice Day) until November 14, 1918, and that for this service he was entitled to a certificate of honorable discharge from the Army, instead of the certificate of "Discharge from the Draft" which had been issued to him. He also prayed for a mandatory injunction to compel issuance to him of a certificate of honorable discharge from the Army.

The complainant alleged that on November 9, 1918, he received a communication from his local draft board directing him to report to the board at Davenport, Iowa, for "immediate military service" at 9 a. m., November 11, 1918, and stating that from that day and hour he would be "a soldier in the military service of the United States"; that he reported as ordered, and was made the leader of the

[1] The Secretary of War and The Adjutant General against whom the action was originally instituted are no longer in office; their successors have been properly substituted as parties.

drafted group there assembled which was to board a train that day for a mobilization camp at Camp Dodge, Iowa; that during the day he was told that because of the Armistice the draft call had been canceled; that he and the other draftees would not go to Camp Dodge, but could return home, still soldiers, and await further orders; that four days later he received a notice from his board that by telegraphic order of the Provost Marshal, acting under instructions of the President, all induction orders throughout the Nation had been canceled, and all registrants, who, like himself, had been inducted but not entrained, were discharged from the Army; and that cancellation of their induction orders would have the effect of an honorable discharge from the Army. He further alleged that in January, 1919, he received a certificate dated November 14, 1918, entitled "Discharge from Draft," accompanying which was a check for four dollars ($4.00) bearing the notation "Final Pay"; that because of the foregoing circumstances he had always assumed that his discharge had the effect of an honorable discharge from the Army; that he had obtained certain tax exemptions from the State of Iowa on the ground that he had such a discharge, but was later authoritatively denied the exemptions by reason of a decision of the State supreme court, *Lamb* v. *Krueger*, 233 Iowa 730; that it was after this decision that he applied for and was denied an honorable discharge by the Secretary and Adjutant General.

The District Court sustained petitioner's motion to dismiss the complaint on the ground that it failed to state a cause of action for which relief could be granted. Other grounds of the motion, not passed on by the District Court, were that the alleged cause of action was not justiciable, was barred by laches, and that the type of certificate to be issued draftees under the circumstances alleged was a matter solely within the discretion of the Secretary of War and not a subject for judicial review. The Court of Appeals

reversed, rejecting all the grounds set up in the motion to dismiss. 154 F. 2d 319. This holding not only decided important questions concerning the power of the War Department, but also upset twenty-five years of important War Department rulings and practices which have affected, and will hereafter affect, the status and claims of thousands of draftees of the First World War. This called for our review, and we granted certiorari.

Whether and to what extent the courts have power to review or control the War Department's action in fixing the type of discharge certificates issued to soldiers,[2] is a question that we need not here determine; nor need we decide whether the action should have been dismissed because of laches. For we are satisfied that the War Department was within its power in granting a discharge from draft rather than the type of discharge it granted soldiers who performed military service after having become fully and finally absorbed into that service.

The only statute which directly bears upon "certificates of discharge" for enlisted men, Article of War 108, set out below,[3] does not particularly prescribe the types or contents of certificates authorized to be granted. But pursuant to authority granted by Congress,[4] the War Department many years ago promulgated Army Regulation No. 150 which provided for three types of certificates of dis-

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[2] See *Denby* v. *Berry*, 279 Fed. 317, 263 U. S. 29; *Davis* v. *Woodring*, 111 F. 2d 523; *Palmer* v. *United States*, 72 Ct. Cls. 401; *Wilbur* v. *United States*, 281 U. S. 206; *cf.* 58 Stat. 286, 38 U. S. C. Supp. IV, § 693h.

[3] "No enlisted man, lawfully inducted into the military service of the United States, shall be discharged from said service without a certificate of discharge signed by a field officer of the regiment or other organization to which the enlisted man belongs . . ." 39 Stat. 619, 668.

[4] 18 Stat. 337, 10 U. S. C. § 16; see also *United States* v. *Elinson*, 16 Pet. 291, 301–302.

charge: honorable, dishonorable, and unclassified.[3] An honorable discharge was one granted to a soldier whose conduct in service had been such as to warrant his reenlistment. This regulation was well suited to fit cases of soldiers who had enlisted under ordinary conditions, had seen service and had been discharged in the course of regular Army routine. On its face, however, it shows how poorly it was adapted to fit the extraordinary circumstances bound to develop in connection with a nation-wide program for passing upon acceptances, rejections, and discharges of draftees in the course of their progress from their homes to their complete and final integration into the Army. So, after the passage of the 1917 Draft Act, 40 Stat. 76, the War Department, on January 12, 1918, issued its Circular No. 651 in which it made provision for men discharged from draft as distinguished from men discharged from the Army. This provision, in effect when respondent reported for induction, had particular, though not necessarily exclusive, reference to draftees rejected for one reason or another at mobilization camps after their induction at their local draft boards. But despite the fact that draftees became subject to military law and duty from the moment of their

[3] Paragraph 150 of the Army Regulations of 1913, corrected to April 15, 1917, was as follows:

"150. Blank forms for discharge and final statements will be furnished by The Adjutant General's Department and will be retained in the personal custody of company commanders. Discharge certificates will be used in the discharge of enlisted men and for no other purpose, and will be of three classes: For honorable discharge, for discharge, and for dishonorable discharge.

They will be used as follows:

1. The blank for honorable discharge, when the soldier's conduct has been such as to warrant his reenlistment and his service has been honest and faithful.

2. The blank for dishonorable discharge, for dishonorable discharge by sentence of a court martial or a military commission.

3. The blank for discharge when the soldier is discharged except as specified under sections 1 and 2 of this paragraph (C. A. R. Nos. 14 and 34)."

arrival for entrainment at the local board, Selective Service Regulation 174–176 provided that they nevertheless were not finally accepted for military service, and could be rejected after arrival at camp.* And it was not until they had been finally accepted that they could or would be assigned to full-fledged duty as soldiers.

The Discharge from Draft Form No. 638, referred to in Circular No. 651, was originally prepared for draftees rejected at camp after induction "on account of physical unfitness, dependency, etc." Form No. 638 had been in use long prior to the respondent's rejection on the ground that the Government did not need his services after the Armistice. Had the Armistice not been declared, had respondent gone on to Camp Dodge, and had he then been rejected for any reason there, he would have received, not an honorable discharge from the Army, but a "Discharge from Draft." Yet we are asked to give the regulations and certificates a judicial construction, contrary to the Army's construction, whereby respondent, who got no farther than his local board, would stand in a better status than the tens of thousands of other draftees who came much closer to complete integration into the Army than he ever did.

An argument to support this contention is that the telegraphic order issued from Army headquarters on Armistice Day, which canceled entrainment orders for respondent and about 155,000 other draftees then ready for entrainment, provided that all of them were "discharged from the Army." But that same order stated that "The issue of formal papers of discharge will be considered and determined later" and that the purpose of the telegraphic order was "merely to cancel outstanding calls and stop the entrainment thereunder of men for the Army." And when "the issue of formal papers of discharge" was "later"

* *Cf. Gibson* v. *United States*, No. 23, O. T. 1946; *Dodez* v. *United States*, No. 86, O. T. 1946.

considered, it resulted in War Department Circular No. 111 of 1919. That circular was the follow-up of the President's Armistice Day draft cancellation order, and as foreshadowed by the Armistice Day order, this circular prescribed with definiteness the type of "formal papers of discharge" which this respondent and others like him would later receive. It was a "Discharge from Draft."

No statute or previous Army Regulation had provided for the extraordinary situation which developed on Armistice Day and which made it necessary for the President to halt the processing of these thousands of men and direct that they return to their homes. When this new situation arose, it was certainly within the province of the War Department to provide for its solution by, among other things, issuing to those returned home an appropriate form of certificate, whether of the honorable discharge variety, a "discharge from the draft," or some special form designed specifically for the occasion. Respondent was inducted into the Army and was discharged before he reached a mobilization camp for final processing. His discharge adequately indicates these facts. The law demands no more.

Reversed.